ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, DC
November 16, 2007

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Washington, D.C.

November 16, 2007

I. Opening Business

Opening business includes introduction of new member and new liaisons; approval of the minutes of the Spring 2007 meeting; a report on the June 2007 meeting of the Standing Committee; developments regarding Proposed Rule 502; and an update on the report to Congress regarding the harm-to-child exception to the marital privilege.

II. Restyling Evidence Rules

The Committee has approved a project to restyle the Evidence Rules. The agenda book contains a memorandum outlining the project, including protocol for restyling and a rough timeline for the project. The agenda book also contains preliminary restylings of Evidence Rules 101-302, 404, and 612. These were prepared by Professor Kimble and revised by him after comments from the Reporter. Comments on the preliminary restylings would be most appreciated.

III. Possible Amendment to Evidence Rule 804(b)(3)

The agenda book contains a memorandum from the Reporter, prepared at the Committee's request, on a possible amendment to Rule 804(b)(3) that would require the government to prove corroborating circumstances clearly indicating trustworthiness before a declaration against penal interest can be admitted against the accused. The proposal would extend the existing corroborating circumstances requirement — currently applicable only to statements offered by the accused — to statements offered by the prosecution.

IV. Update on Case Law Development After *Crawford v. Washington.*

The agenda book contains a memorandum from the Reporter setting forth the federal case law applying the Supreme Court's decisions in *Crawford* and *Davis*, and discussing the implications of that case law on any future amendments of hearsay exceptions.

V. Hate Crimes Legislation

Congress is considering hate crimes legislation, one section of which would probably have an effect on Evidence Rule 404(b). The agenda book contains a memo from the Reporter setting forth the legislation, analyzing its potential effect, and discussing whether the Committee might take a position on the legislation in a letter to Congress.

VI. Next Meeting

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Judge Michael M. Baylson (Civil Rules Committee)
Judge John F. Keenan (Criminal Committee)

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I.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 12-13, 2007

Rancho Santa Fe, California

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 12-13, 2007 in Rancho Santa Fe, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joan N. Ericksen.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
William W. Taylor, III, Esq.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Elizabeth Shapiro, Esq., Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Matthew Hall, Esq., Law Clerk to Hon. David Levi, Chair of the Standing Committee on Rules of Practice and Procedure

Opening Business

Judge Smith asked for approval of the minutes of the Fall 2006 Committee meeting. The minutes were approved with minor amendments suggested by the Department of Justice representative. Judge Smith also reported on the January 2007 meeting of the Standing Committee.

Waiver of Attorney-Client Privilege and Work Product: Proposed Evidence Rule 502

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, or even a waiver of the document disclosed, then the discovery process could be made less expensive.

Another concern considered by the Committee the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. The Committee sought to determine whether the protection of selective waiver is necessary to encourage cooperation with government investigations.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chair of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate a rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Evidence Rules Committee complied with this request and prepared a draft rule to address waiver of privilege and work product — a proposed Rule 502. The Committee recognized that unlike other evidence rules, a rule governing privilege would eventually have to be enacted directly by Congress. See 28 U.S.C. § 2074(b). The first draft of Rule 502 was the subject of a hearing conducted at Fordham Law School in April 2006. In response to comments at that hearing and discussion at the subsequent Committee meeting, the draft rule was substantially revised. The Committee unanimously approved the redrafted proposal for release for public comment, and the Standing Committee voted unanimously to issue the revised proposed Rule 502 for public comment.

For the Fall 2007 meeting, the Reporter prepared a discussion memorandum that highlighted the public comments and other suggestions concerning possible changes to the draft of Rule 502 that was released for public comment. The Committee discussed these comments and suggestions at the meeting, and voted to implement a number of changes.

The comments considered by the Committee, and the Committee's discussion and vote, were as follows:

1. Recommendations by the Style Subcommittee of the Standing Committee:

The Style Subcommittee of the Standing Committee proposed a number of changes to the Proposed Rule 502 as it was released for public comment. The most important change was to add an introductory sentence describing the disclosures that were covered by the Rule. Under the protocol established by the Standing Committee, recommendations for style changes by the Style Subcommittee are dispositive unless the Advisory Committee determines that the recommendation would change the substance of the rule.

In advance of the Committee meeting the Reporter discussed a number of the style suggestions made by Professor Kimble, the consultant the Style Subcommittee. Some of Professor Kimble's recommendations were dropped as possibly affecting the substance of the Rule. At the Committee meeting, members discussed the suggested style changes that had not been dropped. The Committee focused mainly on whether the description in the initial sentence, added by the Style Subcommittee, was sufficiently comprehensive to cover all disclosures intended to be covered by the Rule. After discussion, the Committee determined that none of the suggested style changes would have any effect on the substance of the rule. The restyled version then became the template upon which to evaluate all other suggested changes made in the public comment.

The restyled template reads as follows:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

(2) the holder of the privilege or work-product protection took reasonable precautions to prevent disclosure; and

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the effect of disclosure to a state or local-government agency; with respect to non-governmental persons or entities. This rule

does not limit or expand a government agency's authority to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

(f) Definitions. — In this rule:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial.

2. Application to Diversity and Pendent Jurisdiction Cases: A number of public comments suggested that there was an ambiguity on whether Rule 502 as issued for public comment applies to diversity and pendent jurisdiction cases. They noted a possible tension between Rule 502, which provides a federal law of privilege for a "federal proceeding" (without distinguishing between federal question and diversity or pendent jurisdiction cases) and Rule 501, which provides that the state law of privilege applies when state law provides the rule of decision. Committee members reviewed these public comments and noted that any tension between the two Rules could be resolved by concluding that Rule 502 supersedes Rule 501 because it is later in time. But it would also be plausible to argue that Rule 502 is not applicable to diversity or pendent jurisdiction cases, because supersession on such an important question should not be inferred, but rather should be found only if the supersession is express.

After discussion, the Committee resolved to clarify that Rule 502 is applicable to diversity and pendent jurisdiction cases. The Committee voted unanimously to add a subdivision to Rule 502 to provide that:

"Notwithstanding Rule 501, this rule applies even if State law supplies the rule of decision."

The Committee also unanimously approved a Committee Note providing as follows:

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state causes of action brought in federal court.

3. Relationship to Rules 101 and 1101: Rule 502 as issued for public comment would have an effect on state court proceedings. If a disclosure of privilege or work product is made at the federal level, the existence and extent of the waiver is governed by Rule 502, even if the protected information is offered in a state court proceeding. Some public comment suggested that Rule 502's impact on state court proceedings creates some tension with Evidence Rules 101 and 1101. Rule 101 provides that the Evidence Rules "govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in rule 1101." Rule 1101 provides that the Evidence Rules apply to "the United States district courts" and other federal courts in all proceedings, with the exceptions stated in Rule 1101(d) (which exceptions include grand jury proceedings, sentencing proceedings, etc.). Thus, it can be argued that Rule 502 cannot extend to state proceedings because the applicability of the Evidence Rules is limited to federal proceedings by Rules 101 and 1101.

The Committee began its consideration of the relationship between Rule 502 and Rules 101 and 1101 by discussing whether Rule 502 should in fact apply to state proceedings. A Committee member expressed concern that Congress may react negatively to any perceived encroachment on state law objectives. Another member suggested that any applicability to state proceedings should be muted — that a direct statement that Rule 502 applies to state proceedings would constitute a red flag. But after extensive discussion, the Committee unanimously resolved that Rule 502, in order to be effective, must have some effect on state proceedings — at least where the disclosure of protected information occurred at the federal level — and that there was no reason to hide that fact. Rule 502 must govern state proceedings with respect to disclosures initially made at the federal level, or else lawyers in *federal* court would not be able to rely on the protections of Rule 502, for fear that a waiver will be found in a subsequent state court proceeding under a less protective state law. Thus, binding state courts to the federal law of waiver as to disclosures made at the federal level promotes a legitimate federal interest. Members noted that Rule 502 makes no attempt to regulate state court determination of waiver when disclosures are initially made at the state level; it is thus limited to situations in which there is a substantial federal interest at stake.

After determining that Rule 502 properly governs the consequences of disclosures at the federal level when the protected information is later offered in a state proceeding, the Committee next considered whether it was necessary to clarify that Rule 502 would apply in such circumstances despite the limitations on the applicability of the Evidence Rules set forth in Rules 101 and 1101. The Committee determined unanimously that the tension between Rules 502 and 101/1101 should be addressed, because otherwise litigation could arise in state court proceedings where a disclosure of relevant privileged information had been made at the federal level. A litigant could argue that the state court is not bound by the federal waiver rule, despite its specific language, because Rule 502 was subject to a jurisdictional limitation imposed by Rules 101 and 1101. The Committee concluded that clarification was necessary to forestall that threat of litigation; it voted unanimously to add the following language to the Rule:

> "Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule."

The Committee also unanimously approved an addition to the Committee Note to correspond to the added text. The addition to the Committee Note is as follows:

> The protections against waiver provided by Rule 502 must be applicable when disclosures of protected communications or information in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

3. Applicable Law When State Disclosures Are Offered In Federal Proceedings: Rule 502 as released for public comment did not (with one exception) specify which law of waiver applies when a disclosure is made in a state proceeding and the disclosed information is subsequently offered in a federal proceeding. (The exception was the provision on selective waiver, which specifically provided that state law would govern the effect of disclosure made to a state office or agency). The Reporter's memo to the Committee indicated that if Rule 502 was not changed to cover the question of applicable law in a federal proceeding as to disclosures made in state proceedings, then the applicable law would be provided by Rule 501 — meaning that the state law of waiver would apply in diversity and pendent jurisdiction cases, and the federal law of waiver would apply in federal question cases. The Reporter suggested that Rule 502 as issued for public comment should be changed to provide a specific rule on applicable law in federal proceedings for disclosures initially made at the state level — otherwise the choice of law questions would be extremely complicated and difficult for the parties and the court to navigate.

After extensive consideration, the Committee determined unanimously that the best rule on applicable law (state or federal) would be to apply the law of waiver that is the most protective of privilege. That is, if state law would find no waiver but Rule 502 would, then the state law of waiver would apply; conversely, if Rule 502 would find no waiver but state law would, then Rule 502 would apply. The Committee determined that this result made the most sense for both state and federal interests. Parties in state court should be able to rely on a more protective state law of waiver, without fear that it will be undermined subsequently by a less protective federal rule. And if Rule 502 were more protective under the circumstances, the federal interest in applying that rule and protecting the privilege outweighs any state interest, given that the information is being offered in a federal court.

The Committee voted unanimously to add the following language to the text of Rule 502:

> **Disclosure made in a state proceeding.** — When the disclosure is made in a state proceeding and is not the subject of a state-court order, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

The Committee also agreed to a Committee Note to the new provision, stating as follows:

Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. Where the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, where the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of discovery.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

The Committee then considered a proposal from a Committee member to expand the above subdivision to treat not only state disclosures offered in federal proceedings, but also to treat the effect of federal disclosures later offered in state proceedings. The Committee member proposed the following subdivision:

Application to federal and state proceedings.

(A) When the disclosure is made in a federal proceeding or to a federal public office or agency, the disclosure is not a waiver in any federal or state proceeding, if it is not a waiver under this rule.

(B) When the disclosure is made in a state proceeding or to a state or local government office or agency, the disclosure is not a waiver in any federal proceeding if:

(1) it would not be a waiver under this rule if it had been made in a federal proceeding or to a federal public office or agency;

(2) it is not a waiver under the law of the state where the disclosure occurred; or

(3) it is subject to an order of the state court finding that the disclosure was not a waiver.

After extensive discussion, the Committee determined that the proposal would create a number of problems and should not be added to the Rule. One problem was that subdivision (A) refers to "the disclosure" as "not a waiver", but this language would not cover Rule 502's provision on subject matter waiver, where the question is not whether disclosure is a waiver but whether a waiver extends to other privileged information that has not yet been disclosed. The Committee also concluded that any reference in the text of the rule to the enforceability of state court orders on waiver would be problematic, because such enforceability is already governed by the Full Faith and Credit Act and extensive case law.

4. Consideration of Suggested Changes to Rule 502(a) on Subject Matter Waiver: The Committee considered several suggestions made during the public comment for change to Rule 502(a), the provision on subject matter waiver.

Limiting Subject Matter Waiver to Intentional Disclosures:

The first suggestion was that the text should be changed to clarify that a subject matter waiver can never be found unless the waiver is intentional. The purpose behind this change would be to make it clear that an inadvertent disclosure of privileged information during discovery would never lead to the drastic consequences of a subject matter waiver. In response to this suggestion, one Committee member posited that there may not need to be a need for protection against subject matter waiver for mistaken disclosures, because the provision on inadvertent disclosure (Rule 502(b)) would grant protection against any finding of waiver so long as the producing party acted with reasonable care and took prompt and reasonable steps to get the mistakenly disclosed information returned. But other members noted that protection against subject matter waiver was necessary even with the protections provided by Rule 502(b) — otherwise parties will be likely to increase the costs of preproduction privilege review in order to avoid even the remote possibility of a drastic subject matter waiver.

Committee members also considered whether the language on intentionality should refer to the intent to disclose the information or to the intent to waive the privilege. After discussion, the Committee determined that subject matter waiver should not be found unless it could be shown that

the party specifically intended to waive the privilege by disclosing the protected information. The Committee voted unanimously to amend proposed Rule 502(a) to provide that subject matter waiver could only be found if "the waiver is intentional."

Applying the Subject Matter Waiver Provision to Subsequent State Court Proceedings:

Some public comments suggested that Rule 502(a) should be changed to clarify that its subject matter waiver rule binds state courts reviewing disclosures of protected information made in federal court. After discussion, the Committee unanimously determined that Rule 502(a) should expressly bar a state court from finding a subject matter waiver with respect to a disclosure made at the federal level. The Committee concluded that without such a change, Rule 502(a) would be inconsistent with the other effective subdivisions of the Rule, all of which bind state courts to respect federal law on waiver when the disclosure is made at the federal level. The Committee reasoned that binding state courts to Rule 502(a) as to disclosures made at the federal level was necessary, otherwise parties could not rely on the protections of the rule for fear that a disclosure would be found to be a subject matter waiver under some state's law.

5. Consideration of Suggested Changes to the Inadvertent Disclosure Provision, Rule 502(b): The Committee considered several suggestions made during the public comment for change to Rule 502(a) on subject matter waiver.

Concerns expressed in public comment about the "reasonable precautions" standard, necessary for a finding that an inadvertent disclosure is not a waiver:

1. Public comments suggested that the "reasonable precautions" standard is subject to being interpreted to require the producing party to take such strenuous efforts to avoid waiver that there will be no cost-savings, and thus the goal of the rule would be undermined. Those expressing this concern argued that the textual language should be softened, and that the note should clarify that herculean efforts in pre-production privilege review are not required, allowing for the use of such procedures as scanning software can be found to be reasonable precautions. Other suggestions included clarification that the court should take into account factors such as the scope of discovery and the discovery schedule.

2. Public comments noted that the reasonable precautions standard provides a single factor test, whereas the predominant test in the federal courts is to employ a multi-factor test.

3. One public comment noted that the reasonable precautions standard does not take into account the burdens of retrieval on the party receiving the protected information.

The Committee considered and discussed each of these concerns. It made the following determinations:

1. The standard in the Rule should be changed from "reasonable precautions" to "reasonable steps" in accordance with a number of public comments.

2. Language should be added to the Committee Note to indicate that the standard of "reasonable steps" is not intended to require multiple levels of eyes-on privilege review, and takes into account the scope of discovery, the time for production, and other relevant factors.

3. Language should be added to the Committee Note to indicate that the multi-factor test of federal common law is not explicitly codified in the text of the rule, because it is not really a test of admissibility but more akin to a grab bag of factors that are not properly placed in the text of a codified evidence rule. The language in the Committee Note should emphasize, however, that the standard of "reasonable steps" is flexible enough to accommodate a variety of factors that are discussed in the federal case law.

4. Language concerning burdens on receiving parties should not be added to the Rule or the Note, as the burden on a receiving party cannot be predicted by the producing party, and it is important for the Rule to provide criteria that can be relied on by the producing party in deciding the extent of preproduction privilege review that is reasonable.

Two suggestions in the public comment for change to the language in Rule 502(a) requiring "reasonably prompt measures" to retrieve the mistakenly disclosed information from the time that the holder "knew or should have known" about the mistaken disclosure:

1. The ABA expressed concern that "reasonably prompt" does not give enough guidance and so will be the subject of litigation. The ABA suggested that the duty to seek return should be expressed in terms of a specific time period, e.g., the producing party must ask for return within [14] days of the time the duty is triggered.

The Committee considered this suggestion and unanimously rejected it. A specific time period for seeking return would create a number of problems, including: 1) how to count days; 2) the anomaly of a specific time period that cannot by definition start at any specific time, but only at the time that it is reasonable under the circumstances; and 3) the difficulty of picking a specific time period that would not be too short for some circumstances and too long for others.

2. A number of comments expressed concern about the duty to seek return being triggered at the time that the holder "should have known" about the mistaken disclosure. At its last meeting, held before receipt of any public comments, the Committee tentatively decided to retain the "should have known" language in Rule 502(b) — as issued for public comment, the producing party must take reasonably prompt measures from the time it knew or should have known of the mistaken disclosure. The Committee considered the argument, expressed by a member of the Standing

Committee, that the "should have known" language was subjective and malleable, and could lead to a finding that a party in an electronic discovery case should have known about the mistaken disclosure at the time it was made, given the likelihood that mistakes will occur during electronic discovery. The Committee tentatively decided that the "should have known" standard is probably less subjective and less malleable than a standard based on the producing party's actual knowledge.

In public comment and at the New York hearing, however, a different argument was made against the "should have known" requirement. Commenters noted that the term "should have known" implies that the producing party must take reasonable steps *after production,* to determine whether a mistaken disclosure has been made. If the language could be construed to impose that kind of duty on the producing party, that party may be required to do another privilege review for all information *that it has already produced.* And if that is the case, then the goal of the Rule — to reduce the costs of discovery — would be undermined, because post-production review would clearly add to discovery costs.

After extensive discussion the Committee determined that the comments on the "should have known" language had merit. The Committee voted unanimously to delete that language from the text of the Rule, and also to amend the Committee Note to emphasize that the producing party is not required to conduct a post-production review to determine whether any mistaken disclosures have been made.

Extending the protections of Rule 502(b) to disclosures made to federal offices and agencies:

A number of public comments asked the Committee to consider extending the protections of Rule 502(b) beyond disclosures in federal proceedings, to disclosures made to federal offices and agencies. They noted that the cost of pre-production privilege review can be as great with respect to a production to the government as it is in litigation; in the public comment, the Committee received information that a single production to a government regulator cost a corporation more than $5,000,000 in costs of pre-production privilege review.

Most Committee members agreed that extending the protections of Rule 502(b) to productions to federal offices and agencies was a sensible means of limiting the costs of privilege review, which is the basic goal of proposed Rule 502. These members further argued that the protection against mistaken disclosure should apply to any production made to a federal office or agency. They contended that there was no reason to limit the protection to disclosures made in the course of regulatory investigations or enforcement. They reasoned that any limitation in the rule — such as that the production must be made "to a federal office or agency in the exercise of its regulatory, investigative, or enforcement authority" — might give rise to questions about when the office or agency is in fact exercising that authority, a question that would often be difficult for the producing party to determine.

The Department of Justice representative expressed the Department's opposition to extending inadvertent disclosure protections to disclosures made to a federal office or agency, and then further extending that protection by removing the limitation of the disclosure being made in the exercise of regulatory, investigative or enforcement authority. The Department agreed that there may be some benefits to this extension in limiting the costs of production of information, but it argued that extending the protection beyond litigation might lead to negative ramifications that were not considered or raised in the public comment period. The Department representative argued that extending the inadvertent disclosure protections would require actions by people well downstream of any "proceeding" in which the inadvertent disclosure would be judged. For example, where the government is reviewing a proposed take-over of two companies, or a company proposing to take over a government function, and the company inadvertently submits privileged material to the government, the parties may disagree over whether there is a waiver, and there is no proceeding at that point in which to adjudicate the issue. The government might rely on the document to make an administrative decision, which, if challenged, raises the question of whether a court could overturn a decision if it found that there was an inadvertent disclosure. And once out of the investigatory or regulatory context, Rule 502 could reach so far as to require government contractors to consult the Rules of Evidence in their negotiations with the government, even though no proceeding is contemplated, and may never occur. The cautious party may believe that "reasonably prompt steps" to recover an inadvertently produced document might include bringing a proceeding where none existed. Otherwise, if nothing is done other than a demand, there could be the concern that down the road, the party will be found not to have taken reasonably prompt steps to rectify the mistaken disclosure.

The Committee discussed and considered the Department's concerns. Members responded that the examples raised by the Justice Department could arise under the existing federal common law of waiver. As that is so, it made sense to have that law of waiver in one place, i.e., Rule 502, rather than having parties (including the government) search the non-uniform federal common law to determine whether a mistaken disclosure constitutes a waiver when disclosures are made to federal offices or agencies. Committee members also argued that disclosures to federal offices or agencies, in any context, raise a sufficient federal interest to justify extending the protection of Rule 502(b).

The Committee voted to extend the protection of Rule 502(b) to all mistaken disclosures made to federal offices or agencies. The Department of Justice representative was the only dissenter.

Finally, the Committee discussed briefly whether it made sense to extend the protection of Rule 502(b) to *any* mistaken disclosure or privilege or work product, where the information is later offered in a federal proceeding. The example given was that of a privileged letter mistakenly sent to a friend or employee, completely outside the context of a federal proceeding or production to a federal office or agency. Committee members resolved that there would not be a sufficient federal interest in protecting these disclosures, and that extending the protections of Rule 502 to such disclosures could create conflicts with legitimate state interests. Such an extension was found especially unwarranted in the absence of public comment.

The revised version of Rule 502(b), as approved by the Committee, reads as follows:

(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

The Committee Note to Rule 502(b), as approved by the Committee, reads as follows:

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, a communication or information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to such disclosures as they are in litigation.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver– the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those factors. Other relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected communications or information. Efficient systems of records management implemented before litigation will also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of communications or information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

6. Selective Waiver: Rule 502(c) as issued for public comment stated that a waiver by disclosure to federal offices or agencies exercising investigatory or prosecutorial authority would not constitute a waiver in favor of private parties. The Committee did not approve this "selective waiver" provision on the merits. Rather, it placed the language in brackets in order to elicit public comment on the subject of selective waiver — a subject that the Committee had been asked to address.

During the public comment period, the selective waiver provision was without question the most controversial part of proposed Rule 502. It was adamantly opposed by bar groups and private lawyers; it was enthusiastically favored by government offices and agencies. The basic arguments expressed in favor of selective waiver were 1) it is a necessary tool for corporations to be able to cooperate with government investigations when they would not otherwise do so for fear that the information disclosed to the government could be used by private parties; and 2) it will decrease the

costs of government investigations. The basic arguments expressed against selective waiver were 1) it would add more pressure on corporations to waive the privilege— pressure that would only feed into the alleged "culture of waiver" already established by federal agencies; and 2) it would deprive private parties of relevant information that may be necessary for private recovery. (Other arguments for and against selective waiver are described in the summary of public comment attached to proposed Rule 502, as submitted to the Standing Committee as an action item).

At the Spring meeting Committee members discussed whether the selective waiver provision should be retained in proposed Rule 502. The discussion (and the public comment) indicated that selective waiver raised empirical questions that the Committee was not in a position to determine — most specifically whether selective waiver protection is necessary to encourage corporations to cooperate with government investigations, or instead whether corporations are sufficiently incentivized to cooperate so that selective waiver would be an unjustified protection. Committee members also noted that much of the debate on selective waiver was in essence political. For example, most of those opposed to selective waiver argued that it would only aggravate the "culture of waiver" that currently exists when public agencies seek privileged information from corporations. And most of those in favor denied the existence of a "culture of waiver". But the Committee determined that 1) whether a culture of waiver was a good or bad thing was essentially a political question, and 2) whether such a culture existed was an empirical question. Neither question could be determined by the Committee during the rulemaking process.

Some members opposed to selective waiver emphasized that the doctrine has been rejected by almost all federal courts, and therefore any rule adopting selective waiver should bear a heavy burden of justification — one that had not been met during the public comment. Finally, members noted that if a selective waiver provision were included in Rule 502, it would probably have to require state courts to adhere to selective waiver protection for disclosures made to federal regulators. Otherwise the provision could not be relied upon for sufficient protection from the consequences of disclosure. But binding state courts to selective waiver would raise significant problems of federalism, because most states do not recognize selective waiver.

After extensive discussion, the Committee voted unanimously to drop the provision on selective waiver from Proposed Rule 502.

The question for the Committee, after this vote, was whether the selective waiver provision should be made part of a separate report to Congress, and if so, whether the Committee should take any position in that report on the subject of selective waiver. The Committee unanimously determined that it would be appropriate to make some report to Congress on selective waiver. Members reasoned that Congress requested that the Committee consider selective waiver, and so Congress was entitled to some report on the Committee's extensive work on the subject. The Committee resolved that it would submit to the Standing Committee a separate report to Congress on selective waiver, with the recommendation that the report be submitted to the Judicial Conference and referred to Congress as a report of the Conference.

The next question for the Committee was whether it should take some position on selective waiver in the report to Congress. As the Committee had already decided to drop selective waiver from Proposed Rule 502 because it could not support the provision on the merits, the three options remaining for the Committee in the report to Congress were: 1) provide language that Congress might use for a statute on selective waiver but take no position on the merits; 2) provide language that Congress might use, but recommend against any enactment of a selective waiver statute; and 3) recommend against a selective waiver statute and provide no language for Congress to use.

The Committee quickly rejected the third option — providing no statutory language for Congress to consider — on the ground that this option would not fully respond to the request for a rulemaking procedure on selective waiver. The Committee held three hearings in which much of the testimony focused on selective waiver, and the Committee spent many hours drafting and reviewing language for a selective waiver provision. Under these circumstances, the Committee determined that it was appropriate to refer this work product to Congress, in the event that Congress should decide to proceed with separate legislation on selective waiver.

One member argued in favor of the second option — recommending against selective waiver. That member reiterated many of the arguments against selective waiver that were raised in the public comment. In response, many members emphasized that while they may not personally support selective waiver, it would not be appropriate to take a position on the merits recommending against such legislation. To take such a position would involve the Committee in the political disputes and unresolved empirical questions that led the Committee to drop the selective waiver provision from Rule 502 in the first place.

At the end of the discussion, the Committee voted 1) to propose the submission of a report to Congress that would set forth the arguments before and against selective waiver that were raised in the public comment; 2) to take no position on the merits of selective waiver in that report, while explaining that selective waiver raises controversial issues that the Committee was not in a position to resolve; and 3) to set forth draft language for separate legislation, for Congress to consider should it decide to implement selective waiver. One member dissented.

The Committee next considered whether the language for a statute on selective waiver should be changed in any respect from the selective waiver provision that was released for public comment as Rule 502(c). The Committee unanimously agreed that the suggested statutory language should cover disclosures made to federal agencies only. Members reasoned that the federalism issues attendant to controlling disclosures to state agencies are extremely serious, and that including language even in brackets to cover state disclosures might suggest that covering disclosures was simply a question of drafting.

7. Extending Rule 502(d) to Confidentiality Orders Not Based Upon the Agreement of the Parties: At the Fall 2006 meeting, the Committee tentatively agreed to

amend the court order provision of Rule 502 so that the enforceability of a court order would not depend on agreement between the parties. Members thought it anomalous that a court order memorializing an agreement between the parties would be entitled to more respect than other court orders on waiver generally. Public comment also noted that court orders on confidentiality would be useful to limit the costs of discovery even where all parties do not agree to such an order (e.g., when only one party has most of the discovery obligations) or when the parties disagree on certain provisions.

At the Spring meeting, the Committee agreed unanimously that the court order provision should be amended to delete the language making enforceability of a confidentiality order dependent on the agreement of the parties.

8. Amendment to Definition of Work Product: Two public commenters argued that the definition of work product in Rule 502 as issued for public comment was too limited, because the work product protection extends to intangibles under federal common law. Thus, a definition limited to "materials" may be construed as not protecting intangible work product.

The law on this subject indicates that while Rule 26 protects only tangible "materials," the federal common law extends equivalent protection to intangibles such as facts learned from work product, and electronic data not in hardcopy. The Committee agreed with the public comment and voted unanimously to amend the definitions section to provide coverage of intangible work product. The definitions section approved by the Committee reads as follows:

> **(g) Definitions**. — In this rule:
>
> 1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> 2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The Committee also unanimously approved a Committee Note to the definitions section to read as follows:

> **Subdivision (g).** The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.
>
> The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product").

9. ABA Proposal on Implied Waiver: At the very end of the public comment period, the ABA proposed an amendment to proposed Rule 502 to cover a purported problem that had not been addressed in any of the hearings on the rule and is not treated by the rule: whether waiver of privileged communications can be implied by disclosing underlying factual information. The proposal was to add an entirely new and lengthy section to Rule 502 on this separate subject matter. The ABA also proposed an extensive Committee Note to accompany this major change to Rule 502.

The Committee voted unanimously to take no action on the ABA proposal regarding implied waiver. Substantial changes to an Evidence Rule, such as proposed by the ABA, require significant research and careful consideration by the Committee. The Committee determined that it could not, under the circumstances presented, simply add the ABA proposal to proposed Rule 502.

Final Committee Determination on Rule 502:

The Committee voted unanimously to recommend to the Standing Committee that Proposed Rule 502 and its Committee Note (both as amended at the meeting), together with a cover letter to Congress (as approved at the meeting), be approved and referred to the Judicial Conference for eventual recommendation to Congress. The text of proposed Rule 502, the Committee Note, and the cover letter to Congress are attached to these minutes. The text of the separate cover letter to Congress on selective waiver, approved unanimously by the Committee is also attached to these minutes, as is the draft language for a selective waiver statute, on which the Committee takes no position.

Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, Section 214, provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--
>
> (1) a child of either spouse; or
>
> (2) a child under the custody or control of either spouse.
>
> * * *

The Reporter and the consultant on privileges prepared a memorandum to assist the Committee in assessing the necessity and desirability of amending the Evidence Rules to provide a harm to child exception to the marital privileges. That memo indicated that almost all courts considering the question had in fact refused to apply either the confidential communications privilege or the adverse testimonial privilege to cases in which the defendant is charged with harm to a child in the household. In other words, a harm to child exception to both marital privileges is already recognized in the federal case law. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege. The memorandum concluded that this recent case was dubious authority, because it provided no analysis; relied on a purported lack of case law on the subject, even though other federal cases apply the exception; and failed to cite a previous case in its own circuit that applied a harm-to-child exception to the adverse testimonial privilege (and accordingly the new case is not even controlling in its own circuit).

The Committee reviewed and discussed the necessity and desirability of an amendment to implement a harm to child exception to the marital privileges. Most members agreed that if it were the Committee's decision, it would not and should not propose an amendment to implement the harm to child exception. This is because the Committee ordinarily does not propose an amendment unless one of three conditions is established: 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it; 2) the existing rule is simply unworkable for courts and litigants; or 3) the rule is subject to an unconstitutional application. With respect to the existence of a harm to child exception, there is no risk of unconstitutional application, and there is no problem of workability, because the exception either applies or it does not. With respect to a split in the circuits, the courts are in fact uniform about the existence of a harm to child exception to the privilege for confidential communications. It is true that there is a split of sorts on the application of the harm to child exception to the adverse testimonial privilege, but that split was only recently created, and by a single case — a case that ignores the fact that its own circuit had previously established the exception. Thus, the Evidence Rules Committee would not ordinarily propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit.

Committee members also noted that an amendment to establish a harm to child exception would raise at least four other problems: 1) piecemeal codification of privilege law; 2) codification of an exception to a rule of privilege that is not itself codified; 3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and 4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The Department of Justice representative noted, however, that the question for the Committee was not whether it would propose an amendment, but rather how to respond to Congress's request for input on the necessity and desirability of such an amendment. Because privilege rules must be enacted by Congress, the standard for proposing a rule of privilege might be different from that used by the Evidence Rules Committee for other rules.

After discussion, the Committee voted to recommend to the Standing Committee a report to Congress concluding that an amendment to the Evidence Rules to codify a harm-to-child exception was neither necessary nor desirable. The Committee approved the draft report prepared by the Reporter, which explains why the exception is neither necessary nor desirable. The Department of Justice representative dissented.

The Committee then reviewed and approved language for a harm-to-child exception to be included in the report to Congress, for its consideration should Congress decide to proceed with the exception. The draft language as approved by the Committee is as follows:

> **Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child.** – The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

Time-Counting Project

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. That template takes a "days are days" approach to time-counting, meaning that weekend days and holidays are counted for all time periods measured in days. It also provides for uniform treatment on when to begin and end counting of any time period, and a uniform method of counting when the period ends on a weekend or holiday.

The question for the Evidence Rules Committee at the Spring meeting was whether a version of the Time-Counting template should be proposed as an amendment to the Evidence Rules. The Committee noted that there are only a handful of Evidence Rules that are subject to day-based time-counting: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown. There are only two year-based time periods that could potentially be subject to the time-counting rule that would govern when a time period begins and ends: 1) Rule 609(b) provides a special balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 2) Rules 803(16) and 901(b)(8) together provide for admissibility of documents over 20 years old.

The Committee reviewed a memorandum from the Reporter which indicated that 1) the day-based time periods in the Evidence Rules will not be shortened or otherwise affected by the time-counting template, because they are all 14 days or longer — the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods 14 days or

longer — so there is no reason to change those periods; and 2) there appears to be no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. Perhaps this is because the day-based time periods in the Evidence Rules are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. And as to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. For example, how likely is it that a document will be 20 years old, depending on how one counts the first or last day of the period? Any dispute on time-counting could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

Committee members noted another problem with adding a time-counting rule to the Evidence Rules: If the template is adopted as an Evidence Rule and kept uniform with the Civil and Criminal Rules on time-counting, some anomalies may arise. For example, the template contains an entire subdivision on counting hour-based time periods. But there are no hour-based time periods in the Evidence Rules. It seems unusual to have a rule on counting hour-based periods when there is no such period in the Evidence Rules — nor is there likely ever to be one. Including such a provision may well create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based time period that they have overlooked. Also, the template provides extensive treatment of what to do if the clerk's office is inaccessible. But the clerk's availability is essentially irrelevant to the time-based periods in the Evidence Rules. Similarly, the "last day" provision, which is tied to when something can be filed with the clerk, is unlikely to have any applicability to any time-based question in the Evidence Rules.

Committee members noted that the anomalies raised above (of having provisions with no practical utility) could be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But that solution raises problems of its own. Any time-counting Evidence Rule would have to co-exist with the time-counting Civil and Criminal Rules. To the extent those rules do not match, there will be confusion and an invitation to litigation — one party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the *rules*, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly. The alternative, perhaps, is to change the template version to provide that the time-counting Evidence Rule is applicable only to time-counting under the Evidence Rules themselves. But disuniformity would still create a problem if the Evidence Rule counted one way as to the time-based Evidence Rules, but the Civil or Criminal Rule came out differently.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem

that would be addressed by such an amendment, and adding the template to the Evidence Rules is likely to create confusion and unnecessary litigation.

Restyling Project

At a previous meeting the Committee directed the Reporter to prepare restyled versions of a few Evidence Rules, so that the Committee could consider the desirability of undertaking a project to restyle the Evidence Rules. That project would be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are "paper-based"; they refer to evidence in written and hardcopy form. A restyling project could be used to update the paper-based language used throughout the Evidence Rules, and more broadly it might be useful in making the Evidence Rules more user-friendly. The general sense of the Committee at previous meetings was that a restyling project had merit and was worthy of further consideration. Members reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

The Reporter asked Professor Joseph Kimble, the Standing Committee's consultant on Style, to restyle three rules of evidence — Rules 103, 404(b) and 612. Professor Kimble graciously agreed to do so. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. They raised questions such as: 1) whether updating certain language would be a substantive or stylistic change; 2) whether adding subdivisions within a rule would be unduly disruptive; and 3) whether certain substantive changes that would improve the rule could be proposed for amendment along with the style changes. After Professor Kimble restyled the three rules, the Reporter reviewed the changes and provided suggestions for change, on the ground that some of the proposed style changes would have substantive effect. Professor Kimble incorporated the Reporter's suggestions in a second draft, and it was that draft that was reviewed by the Committee at a previous meeting.

The Committee recognized that before any more work was done on a restyling project, the Committee would need to determine whether the Chief Justice supported restyling of the Evidence Rules. At the Spring 2007 meeting, John Rabiej reported that the Chief Justice was informed about the possible project to restyle the Evidence Rules and had no objection to the project.

In light of the Chief Justice's position, the Committee voted unanimously to begin a project to restyle the Evidence Rules. No timetable was placed on the project. The Reporter stated that he would work with Professor Kimble to prepare some restylized rules for the Committee's consideration at the next meeting.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not testimonial. Subsequently the Court in *Davis v. Washington* held that statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause. Most recently, however, the Court in *Whorton v. Bockting* explicitly held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause.

The Reporter stated to the Committee that the Court's recent decision in *Bockting* raised the question of whether any amendments should be proposed to the hearsay exceptions on the ground that as applied to non-testimonial hearsay, a particular exception may not be sufficiently reliable to be used against an accused. Before *Bockting*, it could still be argued that reliability-based amendments would not be necessary in criminal cases because the Confrontation Clause still regulated the reliability of non-testimonial hearsay. But that is no longer the case after *Bockting*. The Reporter noted that one possibly questionable exception is Rule 804(b)(3), which provides that a hearsay statement can be admitted against the accused upon a finding that a reasonable declarant could believe that making the statement could send to subject him to a risk of penal sanction. There is no requirement in the Rule that the government provide any further corroborating circumstances indicating that the statement is trustworthy — even though the accused must provide corroborating circumstances to admit such a statement in his favor.

The Committee directed the Reporter to prepare a memorandum for the next meeting, on whether it is necessary to amend Rule 804(b)(3) to require that the government provide corroborating circumstances guaranteeing trustworthiness before a declaration against penal interest can be admitted against an accused.

Closing Business

The Committee noted that the Spring 2007 meeting was Judge Smith's last meeting as Chair of the Committee. The Committee expressed its deep gratitude and appreciation for Judge Smith's outstanding work as Chair. Members and the Reporter emphasized that without Judge Smith's guidance and leadership, the Committee could not have tackled such difficult and important issues as waiver of attorney-client privilege and offers of compromise; Judge Smith was responsible for the Committee's success on these projects, and he will be sorely missed.

The meeting was adjourned on April 13, 2007, with the time and place of the Fall 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter

24

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2007
San Francisco, California
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Monday and Tuesday, June 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

The Department of Justice was also represented at the meeting by Ronald J. Tenpas, Associate Deputy Attorney General, and Alice S. Fisher, Assistant Attorney General for the Criminal Division.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
Joe Cecil	Research Division, Federal Judicial Center
Matthew Hall	Judge Levi's rules law clerk
Professor Geoffrey C. Hazard, Jr.	Committee consultant
Professor R. Joseph Kimble	Committee consultant

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Levi noted that the agenda materials for the meeting were voluminous, consisting of five binders and several separate handouts. He suggested that the committee consider taking further steps to distribute the work more evenly between its January and June meetings, since the January meetings tend to have a lighter agenda. He expressed his gratitude to Judge Rosenthal for agreeing, on behalf of the Advisory

Committee on Civil Rules, to lighten the committee's agenda by deferring consideration of a proposed revision of FED. R. CIV. P. 56 (summary judgment) in order to pursue further dialog with the bar on the proposed rule.

Judge Levi reported with great sadness the death of Mark Kasanin, a distinguished San Francisco attorney and member of the Advisory Committee on Civil Rules from 1993 to 2002. He pointed to Mr. Kasanin's unrivaled expertise in admiralty law, his great insight and judgment, and his broad connections with the practicing bar. Judge Levi noted that Mr. Kasanin had brought to the committee's attention the difficult practical issues faced by the bar with regard to discovery of information stored in electronic form. Indeed, he had been instrumental in getting the advisory committee to initiate the project that eventually produced the package of "electronic discovery" amendments to the civil rules that took effect on December 1, 2006. Judge Levi said that Mark's wife, Anne, had come to all the committee meetings and was well loved by all. He asked the committee to send its condolences to her.

Judge Levi reported that the Chief Justice had named Judge Rosenthal to replace him as chair of the Standing Committee. He said that she would be an absolutely superb chair. He also reported that the Chief Justice had named: (1) Judge Kravitz to replace Judge Rosenthal as chair of the Advisory Committee on Civil Rules; (2) Judge Tallman (9th Circuit) to replace Judge Bucklew as chair of the Advisory Committee on Criminal Rules; (3) Judge Hinkle (N. D. Fla.) to replace Judge Smith as chair of the Advisory Committee on Evidence Rules; and (4) Judge Swain (S. D. N.Y.) to replace Judge Zilly as chair of the Advisory Committee on Bankruptcy Rules.

Judge Levi thanked Judge Kravitz for his enormous contributions to the Standing Committee, and most especially for his work in drafting and coordinating the package of time-computation rules to be considered by the committee later in the meeting. He expressed his delight that Judge Kravitz would soon take over as chair of the Advisory Committee on Civil Rules.

Judge Levi noted that Judge Bucklew had been in the eye of the storm during her term as chair of the Advisory Committee on Criminal Rules, as the committee considered several very controversial proposals of public importance that generated sharply divided views. He noted that it is extremely difficult to achieve common ground, but Judge Bucklew had been masterful in achieving it wherever possible.

Judge Levi pointed out that the Advisory Committee on Evidence Rules, under the leadership of Judge Smith, had worked hard to produce the proposed new FED. R. EVID. 502 (waiver of attorney-client privilege and work product protection), which should be of enormous benefit to the American legal system. He thanked Judge Smith for his exceptional leadership in producing a top-quality product.

Judge Levi pointed out that Judge Zilly had served as chair of the bankruptcy advisory committee during a period of extraordinary rules activity in the wake of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that the committee had been amazingly productive in implementing the massive legislation in a very short period. He thanked Judge Zilly for his grace and good humor under pressure.

Judge Levi noted with regret that the terms on the Standing Committee of Judge Fitzwater and Judge Thrash were about to end and that they would attend their last meeting in January 2008. He said that they had been sensational committee members. Judge Fitzwater, he said, was exceptionally bright and a great problem-solver. Among other things, he noted, Judge Fitzwater had produced the template privacy rule used by the advisory committees to implement the E-Government Act of 2002.

Judge Thrash, he said, had been a member of the style subcommittee and had been instrumental in developing the electronic-discovery and class-action civil rules amendments. In addition, he pointed out, Judge Thrash had played a vital role in shaping the way that committee notes are written, believing that they should normally be short and to the point. He also praised Judge Thrash for his great wit and good heart.

Judge Levi also expressed appreciation for the superb support that he and the six rules committees have enjoyed from the staff of the Administrative Office. He noted that Judy Krivit had just announced her retirement after 16 years with the rules office, and he asked that the minutes reflect the committee's heartfelt thanks and gratitude for her dedicated service.

Judge Levi reported briefly on the rules changes approved by the Supreme Court in April 2007 that would take effect on December 1, 2007. He noted particularly the milestone achievement of restyling the entire Federal Rules of Civil Procedure. The restyled civil rules will also take effect on December 1, 2007.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on January 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters of interest to the committee. First, he said, a subcommittee of the Judiciary Committee of the House of Representatives had just held a hearing on the proposed Bail Bond Fairness Act. The legislation would

directly amend FED. R. CRIM. P. 46 (release from custody) to limit a judge's authority to forfeit a bond for violation of any condition of release other than failure of the defendant to appear at a court proceeding. He reported that Judge Tommy Miller, a former member of the Advisory Committee on Criminal Rules, had testified at the hearing to express the opposition of the Judicial Conference to the legislation. He noted that the Department of Justice was also opposed to the measure. The bill had been reported out of the House Judiciary Committee in the last Congress and was expected to be reported out again this year. But, he said, the prospects for ultimate enactment in this Congress were not favorable.

Mr. Rabiej reported that a draft response had been prepared to a letter from Senator Kyl, which expressed concerns about the limited nature of the changes proposed by the advisory committee to the criminal rules to accommodate the Crime Victims Rights Act. He said that the draft was still being reviewed, but would be sent shortly.

Finally, Mr. Rabiej reported that the privacy amendments to the rules required by the E-Government Act of 2002 will take effect on December 1, 2007. He noted that the amendments essentially codify, with some adjustments, the Judicial Conference's existing privacy policy developed originally by its Court Administration and Case Management Committee.

He said that the Court Administration and Case Management Committee was in the process of updating the privacy policy and was exploring three issues that might have a future impact on the federal rules. First, he said, the committee would encourage the courts not to place certain types of documents in the public case file because they contain personal information that would have to be redacted. Second, the committee was examining a number of problems raised by the posting of transcripts on the Internet. He said that the new policy will likely state that transcripts should not be posted until 90 days after the transcript is delivered to the clerk of court.

The problem remains, though, as to who will be responsible for redacting personal information from the transcripts before they are posted. Under the new federal rules, responsibility falls on the person filing a document, but it is not reasonable to expect the court reporter to be responsible for redaction. Thus, he said, the Court Administration and Case Management Committee was considering requiring the parties to redact personal information and give their edits to the reporter. Finally, Mr. Rabiej said that the Court Administration and Case Management Committee was concerned about persons who surf the web in order to obtain embarrassing or sensitive information about individuals.

Mr. McCabe reported that the rules office was in the process of posting the rules committees' agenda books on the Internet. He noted that the staff was also continuing its efforts to locate and post historic rules committee documents.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center (Agenda Item 4). He directed the committee's attention specifically to a preliminary report by the Center on the processing of capital habeas corpus petitions in the federal courts. The research, he said, shows great variation among the courts as to the speed at which they handle and terminate these cases. He noted, too, that a great deal of the time charged against the federal courts really consists of the time that cases are pending on remand in the state courts.

Judge Levi thanked the Center for its work in compiling and analyzing the local district court rules, orders, and policies dealing with *Brady v. Maryland* requirements. He said that the Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it. Mr. Cecil also reported that the Center was in the process of studying the local rules and procedures of the federal courts in implementing the Crime Victims' Rights Act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in their memorandum of May 9, 2007 (Agenda Item 5).

Judge Kravitz said that he and Professor Struve would address the time-computation template rule and substantive issues, and then each advisory committee would address its own specific rules. He noted that the template had been exceedingly difficult to perfect, but it had improved substantially over time due to many refinements suggested by the advisory committees and their reporters. He highlighted two changes that had been added to the template since the January 2007 meeting.

First, he explained that a number of statutes provide an explicit method for counting time, such as by specifying "business days" only. The template, he said, had been amended to apply only to statutes that do not themselves specify a method. Second, he said, the drafters of the template had struggled with how to count backwards when the clerk's office is inaccessible on the last day of a deadline. He thanked Judge Hartz for recommending that the inaccessibility provision be placed in a separate section. In addition, the committee note will emphasize that although a judge may set a different

time by order in a specific case, a district court may not overrule the provisions of the national rule through a local rule or standing order.

Professor Struve added that the template had been amended to add a definition of "state" that includes the District of Columbia and the commonwealths, territories, and possessions of the United States. She noted that the Advisory Committee on Appellate Rules was still considering the definition and whether to extend it to become a global definition for the appellate rules as a whole. She noted, too, that the template had been adjusted to take account of the fact that some circuits and districts span more than one time zone. She said that the advisory committees were still considering making that adjustment in their own rules.

Judge Kravitz pointed out that the committee was planning to seek legislation to change some short time periods set forth in statutes. The public comments, he said, should be helpful in identifying any statutes that need to be changed. Professor Struve added that the advisory committees had been working hard at identifying any statutes impacted by the proposed rules, and the Department of Justice should complete a comprehensive review of statutes by the end of June. She suggested that the rules web page could provide a link to the list of all the statutes that the committees discover.

Judge Kravitz said that consideration had been given to including language in the template authorizing a judge to alter statutory deadlines for a variety of circumstances, but the idea was not pursued. With regard to legal holidays, he said, the text of the rule will not be changed, but the committee note will include a new sentence addressing ad hoc legal holidays declared by the President, such as the holiday to honor the late President Gerald F. Ford. In addition, individual courts will have to coordinate all their local rules by December 1, 2009, to adjust to the new time-computation method. Finally, Judge Kravitz announced his appreciation that Judge Zilly and the Advisory Committee on Bankruptcy Rules had extended themselves to prepare a complete package of time-computation amendments to the bankruptcy rules so that they can be published at the same time as the time-computation amendments to the other rules.

Judge Kravitz reported that each of the advisory committees would publish its version of the time-computation amendments in August 2007. He said that careful consideration needed to be given to the format of the publication. He suggested that it would be best to include a covering memorandum from Professor Struve explaining what the committees are trying to do on a global basis, and also to put the bar at ease that the net result will be that existing deadlines will not be shortened. But, he said, each advisory committee will be publishing other rules amendments having nothing to do with time computation. So, it would be advisable to have a single time-computation package that stands out from any other proposed rule changes. It might also include a list of all

the specific time periods and rules being changed and alert the district courts to begin the process of making conforming changes in their local rules.

APPELLATE RULES TIME COMPUTATION

Judge Stewart reported that the Advisory Committee on Appellate Rules had adopted the template as a revision of FED. R. APP. P. 26. Professor Struve noted that the advisory committee had modified the template to add subparts to Rule 26(a)(4) to recognize that a court of appeals may span more than one time zone. This, she said, is more likely with the courts of appeals than the district courts. She also noted that the proposed definition of a "state" in the appellate rules is slightly different from the template version.

Professor Struve said that the advisory committee generally had increased the 7-day time periods in the rules to 14 days. But, she noted, the proposed change from 7 days to 14 days in Rule 4(a)(6) would require a statutory change to 28 U.S.C. § 2107 to make the rule and the statute consistent. In a couple of places, she added, the advisory committee had increased the time period from 7 days only to 10 days, rather than 14, based on policy considerations involving the need for prompt responses.

In addition, Professor Struve said that the advisory committee had compiled a list of statutory time limits that should be lengthened. But the list does not include various 10-day statutory periods for taking an appeal, *e.g.*, 28 U.S.C. §§ 1292(b), 1292(d)(1), and 1292(d)(2), which the new time-computation method would effectively shorten to 10 calendar days. She noted that before the 2002 amendments to FED. R. APP. P. 26, litigators had lived with 10 calendar days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

BANKRUPTCY RULES TIME COMPUTATION

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had agreed to publish its time-computation changes to the bankruptcy rules on the same schedule as the other rules. The advisory committee, he said, agreed with the text of the template rule and accompanying committee note, including the most recent modifications. The template would appear as FED. R. BANKR. P. 9006(a). In addition, specific time changes would be made in 39 separate bankruptcy rules. The advisory committee, he said, had agreed with all the proposed conventions adopted by the other advisory committees – such as increasing periods of fewer than 7 days to 7 days and increasing 10-day periods to 14 days – except in the case of two rules.

The committee concluded that two very short deadlines in the current rules should remain unchanged. First, under FED. R. BANKR. P. 1007(d) (list of 20 largest creditors), a debtor in a Chapter 9 case or Chapter 11 case has two days after filing the petition to file a list of its 20 largest unsecured creditors. Second, under FED. R. BANKR. P. 4001(a)(2) (ex parte relief from the automatic stay), after a party has obtained an ex parte lifting of the automatic stay, the other party has two days to seek reinstatement of the stay. The committee would retain both deadlines at two days.

Judge Zilly reported that the biggest controversy faced by the advisory committee was whether to change the current 10-day period for filing a notice of appeal under FED. R. BANKR. P. 8002. In the end, the committee decided to extend the deadline to appeal to 14 days, consistent with the general convention of increasing 10-day periods to 14 days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CIVIL RULES TIME COMPUTATION

Judge Rosenthal reported that the civil version of the template rule appeared as proposed FED. R. CIV. P. 6(a). She noted that the definition of a "state" had been bracketed in proposed Rule 6(a)(6)(B), and it was also included as a proposed amendment to FED. R. CIV. P. 81 (applicability of rules in general) as a global definition that would apply throughout the civil rules. The current Rule 81, she explained, includes the District of Columbia. It would be amended to include any commonwealth, territory, or possession of the United States.

She explained that in recommending changes to rules that contain specific time limits, the advisory committee had followed the convention of increasing periods of fewer than 7 days to 7-day periods and increasing 10-day periods to 14 days. But Rule 6(b) precludes a court from extending the current 10-day period for filing certain post-trial relief motions. Rather than follow the normal course of extending 10-day time periods to 14 days, the advisory committee had decided to fix the period for filing post-trial motions at 30 days, which is a more realistic period for the bar.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CRIMINAL RULES TIME COMPUTATION

Judge Bucklew reported that the Advisory Committee on Criminal Rules had adopted the template as FED. R. CRIM. P. 45(a). She said that it had not had the opportunity to review the most recent changes in the text of the template, but she did not expect that it would have any problem in accepting them. She explained that the current criminal rule governing time computation, unlike the counterpart provisions in the civil, appellate, and bankruptcy rules, does not specify that the rule applies to computing time periods set forth in statutes. Some courts nonetheless have applied the rule when computing various statutory periods.

Professor Beale explained that it is not clear whether courts in general apply existing FED. R. CRIM. P. 45(a) to criminal statutes. Before the restyling of the criminal rules in 2002, Rule 45(a) had applied explicitly to computing time periods set forth in statutes. Deletion of the reference to statutes apparently was an unintentional oversight occurring during the restyling process. Nevertheless, some attorneys and courts still apply Rule 45 in computing statutory deadlines, as they did before the restyling changes.

Judge Bucklew referred to a few changes in individual time periods. With regard to FED. R. CRIM. P. 5.1 (preliminary examination), she said that the advisory committee would increase the 10-day time period to 14 days and the 20-day period to 21 days, which will require conforming changes in the underlying statute. The committee as a matter of policy decided to increase from 7 days to 14 days the deadlines specified in FED. R. CRIM. P. 29 (motion for a judgment of acquittal), FED. R. CRIM. P. 33 (motion for a new trial), and FED. R. CRIM. P. 34(b) (motion to arrest judgment) in order to give counsel more time to prepare a satisfactory motion. The advisory committee lengthened from 10 days to 14 days the maximum time in FED. R. CRIM. P. 41 (search warrant) to execute a warrant, but there was some sentiment among the committee members not to extend the period.

Professor Beale added that magistrate judges commonly require the government to execute a search warrant in less than the maximum 10 days specified in the current rule. Accordingly, the advisory committee did not believe that it was necessary to retain the 10-day period, rather than extend it to 14 days. She noted, too, that there had been some concern among committee members over extending the time to file a motion for a new trial, but the Federal Rules of Appellate Procedure expressly allow the district court to retain jurisdiction in this circumstance. She said that the advisory committee was of the view that the short time period in the current rules frequently leads parties to file bare-bones motions.

Judge Bucklew reported that the advisory committee was also recommending increasing from 10 days to 14 days the time limits in Rule 8 of the §§ 2254 and 2255 Rules for filing objections to a magistrate judge's report.

Professor Beale added that the advisory committee would make additional, minor changes in the text and note to take account of last-minute changes to the template suggested by the other advisory committees.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

EVIDENCE RULES TIME COMPUTATION

Judge Smith pointed out that the Federal Rules of Evidence do not lend themselves to a time-computation rule, and there is no need for one. Professor Capra added that there are no short time periods in the evidence rules, and a review of the case law had revealed no problems with the current rules. Accordingly, the Advisory Committee on Evidence Rules voted unanimously not to draft a time-computation rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of May 25, 2007 (Agenda Item 10).

Amendments for Publication

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on page 8, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 12.1

Judge Stewart reported that his committee had been asked by the Advisory Committee on Civil Rules to consider adopting a new appellate rule to conform with the proposed new FED. R. CIV. P. 62.1 (indicative rulings). Several circuits, he said, have local rules or internal operating procedures recognizing the practice of issuing indicative rulings. Under the practice, a district court – after an appeal has been docketed and is still pending – may entertain a post-trial motion, such as a motion for relief from a judgment, and either deny it, defer it, or "indicate" that it might or would grant the motion if the court of appeals were to remand the action.

The proposal to formalize the indicative ruling practice in the national rules, he said, had been pending for several years, but had not aroused much enthusiasm in the appellate advisory committee. Some members simply saw no need for a rule. Nevertheless, the committee voted 5-3 to recommend a new appellate rule in order to conform with the new civil rule proposed by the civil advisory committee.

Judge Stewart noted that the original proposal from the Advisory Committee on Civil Rules had contained alternative language choices. One would authorize a district court to state that it "would" grant the motion if the court of appeals were to remand. The other would authorize the district court to state that it "might" grant the motion if remanded.

He said that the appellate advisory committee was of the view that the second formulation was too weak to justify a remand by the court of appeals, and the first formulation was too restrictive. After consulting with the other committees and their reporters, substitute language was agreed upon that allows the district court to "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." He added that even if the district judge decides to rule on the matter, the court of appeals still has discretion to decide whether to remand.

Judge Stewart noted that the proposed FED. R. APP. P. 12.1 states that the moving party in the district court must provide prompt notice to the clerk of the court of appeals, but only after the district court states that it would grant the motion or that it raises a substantial issue. He noted that the clerks of the courts of appeals had stated strongly that they did not want to be notified at the time a motion is filed.

Judge Stewart pointed out that the proposed appellate rule covers rulings in both civil and criminal cases. The accompanying committee note explains that FED. R. APP. P. 12.1 could be used, for example, with motions for a new trial under FED. R. CRIM. P. 33. In addition, he said, the text sets the default in favor of the court of appeals retaining jurisdiction. It states that the appellate court may remand for further proceedings in the district court, but retains jurisdiction unless it expressly dismisses the appeal.

Judge Rosenthal explained that the proposed new FED. R. CIV. P. 62.1 had been presented to the Standing Committee at the January 2007 meeting. At that time, several suggestions were made regarding the text of the rule and the need to coordinate closely with the appellate advisory committee. That coordination, she said, had been very productive, and the resulting civil and appellate rules provide an intelligent way to frame precisely what the district court must do. Professor Cooper added that there are a few places in which the committee notes need to be modified further.

Several members said that the proposed rules would promote efficiency. One asked whether the appellate rule would govern bankruptcy appeals. Professor Struve replied that, as written, it would cover bankruptcy appeals, although they are not mentioned specifically in the text. She added that if the Federal Rules of Bankruptcy Procedure were amended to address indicative rulings, the proposed appellate rule would accommodate the change.

The committee without objection by voice vote approved both proposed new rules – FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1 – for publication.

FED. R. APP. P. 4(a)(4)(A) and 22(b)

Judge Stewart reported that the proposed amendments to Rules 4(a)(4)(A) (time to file an appeal) and 22(b) (certificate of appealability) were designed to conform the Federal Rules of Appellate Procedure to changes proposed by the Advisory Committee on Criminal Rules to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255.

The committee without objection by voice vote approved the proposed amendments for publication. [But later in the meeting, the committee voted to publish only the proposed amendment to Rule 22(b), which dealt just with the certificate of appealability. See page 41.]

FED. R. APP. P. 4(a)(4)(B)(ii)

Judge Stewart explained that the proposed amendment would eliminate an ambiguity created as a result of the 1998 restyling of the Federal Rules of Appellate Procedure. The current, restyled rule might be read to require an appellant to amend its prior notice of appeal if the district court amends the judgment after the notice of appeal is filed – even if the amendment is insignificant or in the appellant's favor. The advisory committee, he explained, would amend the rule to return it to its original meaning. Thus, a new or amended notice of appeal would be required only when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or an alteration or amendment of a judgment on such a motion.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. APP. P. 4(a)(1)(B) and 40(a)(1)

Judge Stewart reported that the advisory committee had approved amendments to Rule 4(a)(1)(B) (time for filing a notice of appeal) and Rule 40(a)(1) (time to file a petition for a panel rehearing) to make clear that they apply to cases in which a federal

officer or employee is sued in his or her individual capacity. The committee decided, however, to batch the proposals and await a time to present them with other amendments to the Standing Committee.

Judge Stewart added that the advisory committee also has under study the broader question of whether to treat state government officials and agencies the same as federal officers and agencies in providing them with additional time. The study, though, is unrelated to these proposed amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. APP. P. 26(c)

Judge Stewart reported that the proposed amendment to Rule 26(a) (computing and extending time – additional time after service) would clarify the operation of the "three-day rule." It would give a party an additional three days to act after being served with a paper unless the paper is delivered on the date of service stated in the proof of service. The proposal, he said, would bring FED. R. APP. P. 26 into line with the approach taken in FED. R. CIV. P. 6. He noted that the amendment had been approved by the advisory committee in 2003, but batched for submission to the Standing Committee at a later time as part of a larger package of amendments.

Professor Struve explained that the advisory committee recommended publishing the amendment with two alternative versions of the committee note. Option A would be used if the time-computation amendments are adopted. Option B would be used if they are not. Judge Kravitz recommended that the rule be published with Option A of the note only, and Judge Stewart concurred.

The committee without objection by voice vote approved the proposed amendment and Option A of the accompanying committee note for publication.

FED. R. APP. P. 29(c)

Judge Stewart reported that the proposed amendment to Rule 29 (amicus curiae brief) would add a new paragraph (c)(7) to require an amicus brief to state whether counsel for a party authored the brief in whole or in part and list every person or entity contributing to the brief. Government entities, though, would be excepted. The proposed amendment, he said, tracked the Supreme Court's Rule 37.6 on amicus briefs.

Judge Stewart added that the matter became more complicated after the advisory committee's April 2007 meeting, when the Supreme Court published a proposed amendment to its rule that would require additional disclosures. The Court's proposal, he said, has produced some controversy and opposition both on constitutional and policy grounds. Therefore, the advisory committee was uncertain whether the Court would adopt the pending amendment to Rule 37.6.

As a result, the committee considered the matter by e-mail after the April meeting and proposed two alternative formulations of proposed FED. R. APP. P. 29. Option A would be published for public comment if the Supreme Court were to reject the proposed amendment to its Rule 37.6, and Option B would be published if the Court were to approve the amendment. The difference between the two lies in paragraph (c)(7) of Option B, which adds a requirement that the amicus brief identify every person or entity – other than the amicus, its members, or its counsel – contributing money toward preparing or submitting the brief.

Judge Stewart pointed out that the August 2007 publication date for the proposed amendment to FED. R. APP. P. 29(c) will arise after the Supreme Court is expected to act on its own rule. Accordingly, the advisory committee suggested that the Standing Committee approve both options. If the Court were to drop the amendment to its rule, Option A would be published. But if it were to proceed with the amendment, Option B would be published. In any event, he said, the rule does not present an emergency.

One member expressed concern about the substance of the proposal, especially its requirement that members be disclosed. Others suggested that it would make sense to await final Supreme Court action before proceeding with a proposed change to the appellate rules. Judge Thrash moved to defer the proposed amendment.

The committee without objection by voice vote agreed to defer action on publication of the proposed amendment to Rule 29(c).

Informational Item

Judge Stewart reported that the advisory committee was continuing to hear from the chief judges of the circuits regarding the briefing requirements set forth in their local rules. He added that the committee was working with the attorneys general of the states on the advisability of giving them the same additional time that the appellate rules give to the federal government. And, he said, the committee would continue to examine the definition of a "state" in the appellate rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 8, 2007 (Agenda Item 8).

Amendments for Final Approval by the Judicial Conference

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT PACKAGE

Amendments to Existing Rules
FED. R. BANKR. P. 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009
New Rules
FED. R. BANKR. P. 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011

Judge Zilly noted that most of the amendments presented for final approval had already been seen by the Standing Committee at earlier meetings and are part of a package of 32 rule amendments and 7 new rules necessary to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He explained that most of the amendments had been issued initially in October 2005 as interim rules. All the courts adopted them as local rules and have been operating under them since that time with very little difficulty.

He pointed out that the advisory committee had made some minor changes in the interim rules, added other rules not included in the interim rules, and published the whole package for public comment in August 2006. In addition, since the advisory committee did not have time to publish the proposed revisions in the Official Forms before they took effect in October 2005, the package also included all the forms for public comment.

Judge Zilly reported that the advisory committee had received 38 comments before publication and another 60 following publication. Several public comments addressed many different rules. He said that the advisory committee had not conducted the scheduled public hearing because there were no requests for in-person testimony. Nevertheless, there had been a great deal of written comment on the proposed rules, which are the product of a long process that began in 2005 with the interim rules.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7012, 7022, 7023.1, and 9024

Judge Zilly reported that the proposed amendments to Rules 7012 (defenses and objections), 7022 (interpleader), 7023.1 (derivative proceedings by shareholders), and 9024 (relief from judgment or order) were necessary to conform the Federal Rules of Bankruptcy Procedure to the restyling of the Federal Rules of Civil Procedure effective December 1, 2007. He added that the proposed changes to the bankruptcy rules were purely technical, and there was no need to publish them for public comment.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments to the Forms for Final Approval by the Judicial Conference

OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10,
16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24

Judge Zilly explained that the advisory committee had published for public comment all Official Forms in which any change was being recommended, even though the forms have been in general use since September 2005. As a result of the public comments, he said, the advisory committee had made some minor and stylistic changes in the forms.

He noted that Official Forms 19A and 19B, both dealing with the declaration of a bankruptcy petition preparer, would be consolidated. He said that new Official Form 22, the means test, had been extremely difficult to draft and had attracted a good deal of comment. He pointed out that the governing statutory provisions were unclear, and the public comments had raised 24 different categories of issues regarding the contents of the form. He explained that the committee had designed the form to capture all potentially relevant information from the debtor, but in some instances had left it up to individual courts to determine whether particular information is needed and how it should be used.

Professor Morris added that several of the changes in Form 22 made after the public comment period were designed to bring the text of the form closer to the text of the statute. He also explained that the advisory committee had added new language to the signature box on Form 1 (the petition) warning that the signature of the debtor's attorney constitutes a certification that the attorney has no knowledge after an inquiry that the information filed with the petition is incorrect.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2007.

OFFICIAL FORMS 25A, 25B, 25C, and 26

Judge Zilly explained that new Official Forms 25A (reorganization plan) and 25B (disclosure statement) implement § 433 of the 2005 bankruptcy legislation, which specifies that the Judicial Conference should prescribe a form for a reorganization plan and a disclosure statement in a small business Chapter 11 case. New Official Form 25C (small business monthly operating report) implements §§ 434 and 435 of the legislation and provides a standard form to assist small business debtors in Chapter 11 cases to fulfill their financial reporting responsibilities under the Code. New Official Form 26 (periodic report concerning related entities) implements § 419 of the legislation, which requires every Chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. He added that the advisory committee recommended that these four new forms be approved by the Judicial Conference effective December 1, 2008.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2008.

OFFICIAL FORM 1, EXHIBIT D

Judge Zilly explained that the proposed amendment of Exhibit D to Official Form 1 (individual debtor's statement of compliance with credit counseling requirement) would provide a mechanism for a debtor to claim an exigent-circumstances exemption from the pre-petition credit counseling requirements of the 2005 legislation. By using the form, the debtor would not have to file a motion to obtain an order postponing the credit counseling requirement. The revised Exhibit D would implement proposed new FED. R. BANKR. P. 1017.1, described below, which is being published for comment and would take effect on December 1, 2009.

The committee without objection by voice vote approved the proposed revision of Exhibit D for final approval by the Judicial Conference, to take effect on December 1, 2009.

Amendments to the Rules for Publication

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 8-9, the committee approved the proposed time-computation changes in the Federal Rules of Bankruptcy Procedure for publication.

OTHER RULES

FED. R. BANKR. P. 1017.1

Judge Zilly noted that the new Rule 1017.1 (exemption from pre-petition credit counseling requirement) would provide a procedure for the court to consider a debtor's request to defer the pre-petition credit counseling requirement of the 2005 statute because of exigent circumstances. It states that a debtor's certification seeking an exemption from the counseling requirement will be deemed satisfactory unless the bankruptcy court finds within 21 days after the certification is filed that it is not satisfactory. He added that Exhibit D, described above, was being added to Form 1 (the petition) to implement the proposed amendment.

FED. R. BANKR. P. 4008

Judge Zilly reported that the proposed amendment to Rule 4008 (filing of a reaffirmation agreement) would require that a reaffirmation agreement be accompanied by a cover sheet, as prescribed by a new official form. The new Official Form 27, he said, would gather in one place all the information a judge needs to determine whether the reaffirmation rises to the level of a hardship under the Bankruptcy Code.

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Zilly reported that the proposed amendments to Rules 7052 (findings by the court) and 9021 (entry of judgment) and new Rule 7058 (entering judgment in an adversary proceeding) deal with the requirement that a judgment be set forth on a separate document. He noted that the Standing Committee at its January 2007 meeting had approved the advisory committee's recommendation that the separate document requirement be required for adversary proceedings, but not for contested matters. He

added that the advisory committee had made some changes in the language of the proposed rules at its last meeting.

The committee without objection by voice vote approved the proposed amendments and new rule for publication.

New Official Forms for Publication

OFFICIAL FORM 8

Judge Zilly reported that the proposed amendment to Official Form 8 (individual debtor's statement of intention) would implement the 2005 legislation by expanding the information that the debtor must provide regarding leased personal property and property subject to security interests. The form had been published for comment in August 2006 and rewritten by the advisory committee as a result of the comments. The committee recommended that the revised version be published for comment.

OFFICIAL FORM 27

Judge Zilly explained that proposed new Official Form 27 (reaffirmation agreement cover sheet), which is tied to the proposed amendment to Rule 4008, noted above, would provide the key information to enable a judge to determine whether the reaffirmation agreement creates a presumption of undue hardship for the debtor under § 524(m) of the Code.

The committee without objection by voice vote approved the proposed amendments to Official Form 8 and the proposed new Official Form 27 for publication.

Informational Items

Judge Zilly reported that the advisory committee had considered correspondence from Senators Grassley and Sessions regarding implementation of an uncodified provision in the 2005 bankruptcy legislation. The legislation includes a provision stating the sense of Congress that FED. R. BANKR. P. 9011 (signing of papers – representations and sanctions) should be amended to require a certification by debtors' attorneys that the schedules and statements of the debtor are well grounded in fact and warranted by existing law. The committee, he said, had spent a great deal of time on the issue and concluded after thorough examination that the suggested rule amendment would have an adverse impact on the management of bankruptcy cases and set a different standard for debtors' lawyers than for creditors' lawyers. Accordingly, the committee decided not to recommend amending Rule 9011.

Judge Zilly added that a separate requirement in the Act itself, 11 U.S.C. § 707(b)(4)(C) and (D), imposes a higher standard of review and accountability for attorneys filing Chapter 7 consumer cases. But it deals only with the schedules filed with the petition. The advisory committee, he said, had explored whether: (1) to expand the requirement to include schedules and amended schedules filed after the petition is filed; (2) to apply the requirement to other chapters of the Code; and (3) to apply it to creditor attorney filings as well as those of debtor attorneys. In the end, he said, the advisory committee decided to make none of the changes. It did, however, add a statement to the signature box of the petition reminding the attorney of the statutory requirements.

Judge Zilly added that the committee had received a letter from Representatives Conyers and Sanchez of the House Judiciary Committee commending it for the interim rules and its ongoing efforts to implement the 2005 bankruptcy legislation. The letter, he said, made three observations. First, it complimented the committee for its proposed Official Form 22 (the means test) and its instruction that debtors who fall below the statutory threshold income levels do not have to complete the entire form. Second, it agreed with the advisory committee's proposed amendment to Rule 1017(b) (dismissal or conversion of a case), which requires that a motion to dismiss a case for abuse under 11 U.S.C. § 707(b) or (c) state with particularly the circumstances alleged to constitute the abuse by the debtor. Third, it suggested that Rule 4002(b) (duty of the debtor to provide documentation) places too high a burden on a consumer debtor to provide documentation to the U.S. trustee. Judge Zilly explained that the U.S. trustees had wanted debtors to provide substantially more materials than the proposed rule requires. The advisory committee, he said, had worked on the matter for a long time and was sensitive to the burdens imposed on debtors. But it concluded that the documents required in the rule were either required by the statute or are important in a case.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 25, 2007 (Agenda Item 9).

Amendments for Publication

TIME COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52,
53, 54, 55, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G

As noted above on page 9, the committee approved the proposed time-computation changes in the Federal Rules of Civil Procedure for publication.

FED. R. CIV. P. 62.1

As noted above on pages 12-13, the committee approved the proposed new Rule 62.1 (indicative rulings) for publication.

Informational Items

EXPERT-WITNESS DISCOVERY

Judge Rosenthal reported that the advisory committee was examining the experience of the bench and bar with the 1993 amendment to FED. R. CIV. P. 26 (a)(2)(B) (expert witness testimony). In particular, the committee was considering the extent to which communications between an attorney and an expert witness need be disclosed. The American Bar Association, she said, had urged that restrictions be placed on discovery of those communications, such as by limiting it to communications that convey facts only, and not opinion or strategy.

The advisory committee, she added, had thought that it would be very difficult to draw bright lines to guide attorneys in this area, but it had been encouraged by a recent mini-conference held with a group of experienced New Jersey lawyers. The state court rule in New Jersey limits discovery of conversations between attorneys and expert witnesses. The lawyers at the mini-conference uniformly expressed enthusiasm for the state rule and said that the rule minimizes satellite litigation over non-essential matters and improves professional collegiality. Judge Rosenthal added that the advisory committee was continuing to explore the issue and might come back at the next Standing Committee meeting with a request to publish a proposed amendment to Rule 26.

SUMMARY JUDGMENT

Judge Rosenthal reported that the advisory committee had approved a thorough revision of FED. R. CIV. P. 56 (summary judgment) at its April 2007 meeting, but had decided to defer publishing a proposal in order to engage in further dialogue with the bar.

She noted that Rule 56 had not been amended significantly since 1963. In 1992, there had been an unsuccessful attempt by the advisory committee to rewrite the rule thoroughly. That effort had produced a proposed rule that, among other things, would have codified the standard for granting summary judgment announced by the Supreme Court in its 1986 "trilogy" of landmark summary judgment cases.

By contrast, she emphasized, the current proposal does not address the standard. Rather, it focuses only on procedure. It is, moreover, a default rule that will apply only if a judge does not issue a specific order addressing summary judgment in a particular case. The proposed rule, she said, had been drawn largely from the best practices currently used in the district courts. She thanked the staff of the Federal Judicial Center and James Ishida and Jeffrey Barr of the Administrative Office for their comprehensive work in gathering and analyzing all the local rules of the district courts.

The proposed rule would require a party moving for summary judgment to set forth in separately numbered paragraphs the pertinent facts that are not in dispute and that entitle it to summary judgment as a matter of law. The opposing party, in turn, would have to set out in the same manner the facts that it claims are genuinely in dispute. The parties would also have to make appropriate references and file a separate brief as to the law.

She explained that lawyers had told the advisory committee that it would be extremely helpful to require these statements of undisputed facts. But, she added, in many cases the dueling statements of the parties are akin to ships passing in the night. They are often very lengthy and simply do not address each other. As a result, the advisory committee had attempted to draft the proposed rule in a manner that emphasizes that the parties must specify only those facts that are critical and relied on for, or against, summary judgment. She emphasized the importance of drafting a clear rule. To that end, it would be very beneficial to continue working with the bar to refine the text.

Judge Rosenthal pointed out that the advisory committee was concerned about what to do when an opposing party fails to respond to a summary judgment motion. She said that the case law of the circuits holds that a trial judge may not simply grant the summary judgment motion by default without a response. The local rules of some courts, she said, specify that any facts not responded to are deemed admitted, and judges in those courts say that they find these local rules helpful.

The advisory committee, she explained, had tried to set out in a clear way the steps that the court must follow under these circumstances. Accordingly, the proposed rule authorizes a trial judge to grant a motion for summary judgment, but only after following specific procedural steps and being convinced that the record supports granting the motion. Among other things, the judge would have to give the non-moving party another opportunity to respond before deeming facts admitted.

Judge Rosenthal said that the advisory committee's proposed rule did not address the substantive standard for granting summary judgment. But it would require the judge to state reasons for his or her decision on the motion. In addition, the rule mentions "partial summary judgment" by name for the first time.

A member noted that the draft proposed rule specifies the default procedures that must be followed unless the judge orders otherwise in a specific case. He asked whether the rule would also allow variation from the national rule by issuance of a local rule of court. He pointed out that the local rules of the court in which he practices most often differ substantially from the proposed national rule.

Judge Rosenthal responded that the rule would indeed allow judges to vary from the national default rule by orders in individual cases. But the national rule could not be overridden by local rules of court. In short, it would discourage blanket local court variations, but would allow case-specific variations. Professor Cooper added that the issue of local rules was addressed in the draft committee note to the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 19, 2007 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

CRIME VICTIMS' RIGHTS ACT AMENDMENTS
FED. R. CRIM. P. 1, 12.1, 17, 18, 32, 60, and 61

Judge Bucklew reported that the package of rules changes to implement the Crime Victims' Rights Act, 18 U.S.C. § 3771, consisted of: (1) amendments to five existing rules; (2) a new stand-alone Rule 60 (victim's rights); and (3) renumbering current Rule 60 (title) as new Rule 61. The advisory committee, she said, had begun work on the package soon after passage of the Crime Victims' Rights Act in 2004, and it had reached two key policy decisions: (1) not to create new rights beyond those that Congress had specified in

the Act; and (2) to place the bulk of the victims' rights provisions in a single new rule to make it easier for judges and lawyers to apply. She said that additional rule amendments beyond this initial package might be recommended in the future, but the advisory committee had decided to defer making more extensive changes in order to monitor practical experience in the courts and case law development under the Act.

The proposed amendments, she said, had generated a good deal of controversy during the public comment period and had attracted criticism from both sides. The defense side expressed the fear that the proposed rules would tip the adversarial balance too far against criminal defendants. Victims' rights groups, on the other hand, objected that the proposals did not go far enough to enhance the rights of victims. A letter from Sen. Jon Kyl, she said, had stressed the latter point.

FED. R. CRIM. P. 1

Judge Bucklew explained that proposed Rule 1(b)(11) (scope and definitions) would incorporate the Act's definition of a crime victim. In response to the public comments, she noted, the advisory committee had added language to proposed Rule 60(b)(2) to specify that a victim's lawful rights may be asserted by the victim's lawful representative. In addition, the committee note had been revised to make it clear that a victim or the victim's lawful representative may participate through counsel, and the victim's rights may be asserted by any other person authorized by 18 U.S.C. § 3771(d) and (e). The committee note had also been amended to state that the court has the power to decide any dispute over who is a victim.

Professor Beale reported that one objection raised in several public comments was that the proposed rules do not define precisely who may be a victim. She suggested that if it turns out that the lack of a comprehensive definition causes any problems in actual practice, the advisory committee could come back later and propose a clarifying amendment.

FED. R. CRIM. P. 12.1

Judge Bucklew reported that the proposed amendments to FED. R. CRIM. P. 12.1 (notice of alibi defense) specify that a victim's address and telephone number will not be provided to the defendant automatically. The victim's address and telephone number will be provided only if the defendant establishes a need for them, such as in a case where the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense. Moreover, even if the defendant establishes the need for the information, the victim may still file an objection.

Professor Beale pointed out that the federal defenders had commented that the proposed rule would upset the constitutional balance between prosecution and defense. Moreover, they argued that its requirement that a defendant establish a need for such basic information is unconstitutional because it is not a reciprocal obligation. She replied, though, that the rule does not violate the principle of reciprocal discovery. Rather, it is merely a procedural device, requiring the defendant to state that he or she has a need for the information and then giving the court a chance to decide the matter.

A member questioned the language that would require the defendant to establish a "need" for a victim's address and telephone number. He suggested that the word "need" was misleading and asked what showing of need the defendant would have to make beyond merely asking for the information. He noted that if the advisory committee had intended for the term "need" to mean only that the defendant *wants* the information, a different word should be used. Judge Levi replied that removing the requirement that the defendant show a "need" for the information would be seen as a big step backwards by victims' rights groups. Moreover, it would require that the rule be sent back to the advisory committee.

The member responded that he understood the highly politicized context of the rule. Nevertheless, he said that the proposed amendment as written simply does not say what the advisory committee apparently intended for it to say. He suggested that it might be rephrased to state simply that if the defendant "seeks" the information, the court may fashion an appropriate remedy. Judge Bucklew added that the advisory committee had something more than "seeks" in mind, but it had intended that the standard for the defendant's showing be relatively low. Professor Beale added that the advisory committee had rejected several alternative formulations because of the delicate balance of interests at stake. She said that the advisory committee did not want to turn the defendant's request into an automatic entitlement.

Another participant added that the proposed committee note explains that the defendant is not automatically entitled to a victim's address and phone number. Thus, the rule and the note together clearly suggest that "need" means something more than just a naked request from the defendant.

FED. R. CRIM. P. 17

Judge Bucklew stated that the proposed amendment to FED. R. CRIM. P. 17 (subpoena) would provide a protective device for third-party subpoenas. It would allow a subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order. It also contains a provision allowing a court to dispense with notice to a victim in "exceptional circumstances."

She noted that the advisory committee had modified the rule after publication to make it clear that a victim may object by means other than a motion to quash the subpoena, such as by writing a letter to the court. In addition, based on public comments, the committee had eliminated language explicitly authorizing ex parte issuance of a subpoena to a third party for private or confidential information about a victim. Instead, a reference had been added to the committee note explaining that the decision on whether to permit ex parte consideration is left to the judgment of the court.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require a court to consider the convenience of any victim when setting the place of trial in the district. She added that no changes had been made in the text of the rule after publication, but some unnecessary language had been deleted from the committee note. In addition, language had been added to the note emphasizing the court's discretion to balance competing interests.

FED. R. CRIM. P. 32

Judge Bucklew said that the proposed revisions to Rule 32 (sentencing and judgment) would eliminate the entire current subdivision (a) – which defines a victim of a crime of violence or sexual abuse – because Rule 1 (scope and definitions) would now incorporate the broader, statutory definition of a crime victim.

Rule 32(c)(1) would be amended to require that the probation office investigate and report to the court whenever a statute "permits," rather than requires, restitution. In Rule 32(d)(2)(B), the advisory committee would delete the language of the current rule requiring that information about victims in the presentence investigation report be set forth in a "nonargumentative style." As amended, the rule would treat this information like all other information in the presentence report. Professor Beale added that some public comments had argued that all information in the presentence investigation report should also be verified. She added that some of the comments suggested additional changes that went beyond the scope of the current amendments, and these suggestions would be placed on the committee's future agenda.

Judge Bucklew reported that Rule 32(i)(4) (opportunity to speak) contained a number of proposed language changes. She said that the language of the current rule authorizing a victim to "speak or submit any information about the sentence" would be changed to require that a judge permit the victim to "be reasonably heard" because that is the precise term adopted by Congress in the statute.

FED. R. CRIM. P. 60

Judge Bucklew stated that proposed new Rule 60 (victim's rights) was the principal rule dealing with victims' rights. It would implement several different provisions of the Act and specify the rights of victims to notice of proceedings, to attendance at proceedings, and to be reasonably heard. It would also govern the procedure for enforcing those rights and specify who may assert the rights.

Paragraph (a)(1) would require the government to use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime. Paragraph (a)(2) would provide that a victim may not be excluded from a public court proceeding unless the court finds that the victim's testimony would be materially altered.

Paragraph (a)(3) would specify that a victim has a right to be reasonably heard at any public proceeding involving release, plea, or sentencing. Professor Beale explained that the advisory committee had limited the proposed rule to those specific proceedings. Victims' rights advocates, she said, had argued to expand the rule beyond the statute and give victims the right to be heard at other stages of a case. She added that it is possible that case law over time may expand the right to additional proceedings.

Judge Bucklew said that subdivision (d) of the proposed rule would implement several different sections of the Crime Victims' Rights Act. It would: (1) require the court to decide promptly any motion asserting a victim's rights under the rules; (2) specify who may assert a victim's rights; (3) allow the court to fashion a reasonable procedure when there are multiple victims in order to protect their rights without unduly prolonging the proceedings; (4) require that victims' rights be asserted in the district in which the defendant is being prosecuted; (5) specify what the victim must do to move to reopen a plea or sentence; and (6) make it clear that failure to accord a victim any right cannot be the basis for a new trial. She said that the primary criticism from victims' rights groups was that the new rule did not go far enough to expand the rights of victims.

Professor Beale added that, after publication, language addressing who may assert a victim's rights had been moved from Rule 1 to Rule 60. In addition, Rule 60 had been amended because the published version could have been read to require the court to pay the costs of a victim to travel to the trial – a right not required by statute. In addition, language had been added to clarify the procedure a court should follow "in considering whether to exclude the victim."

Professor Beale emphasized that questions had been raised throughout the rules process as to how far the limited, general rights specified in the statute should be repeated or elaborated upon in the rules. Judge Bucklew explained that victims' advocates had

argued that the basic statutory right that victims be treated with "fairness and dignity" should be the basis for providing a greater array of more specific rights in the rules.

FED. R. CRIM. P. 61

Judge Bucklew reported that the final change in the package was purely technical in nature – to renumber the current Rule 60 (title) as Rule 61. The rule states merely that the rules may be known and cited as the Federal Rules of Criminal Procedure. She said that structurally it should remain the last rule in the criminal rules.

Professor Meltzer moved that the package of crime victims' proposals be approved, but that proposed Rule 12.1 be remanded to the advisory committee for further consideration.

The committee by a vote of 6 to 3 rejected the motion to remand Rule 12.1. Then, with one objection, it voted by voice vote to approve the package of proposed amendments for final approval by the Judicial Conference.

Judge Bucklew noted that the package of victims' rights amendments had required a great deal of time and effort by the advisory committee. She thanked Judge Levi and John Rabiej for their invaluable assistance. Judge Teilborg added that he had been the Standing Committee's liaison to the advisory committee on the project, and he complimented both the advisory committee and Judge Bucklew personally for the superb way that they had navigated the package of rules in light of powerful forces and competing interests.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee's proposed amendment to Rule 41 (search and seizure) would provide a procedure for issuing search warrants to assist criminal investigations in U.S. embassies, consulates, and possessions around the world. She said that the proposal had originated with the Department of Justice, based on practical problems that it had encountered in investigating crimes occurring in overseas possessions and embassies. Under the proposal, jurisdiction to issue warrants for execution overseas would be vested in the district where the investigation occurs or – as a default – in the U.S. District Court for the District of Columbia.

Judge Bucklew explained that the Judicial Conference had forwarded a proposed rule amendment on the same topic to the Supreme Court in 1990, but the Court had rejected it. She explained, however, that the current proposal was much more limited than the 1990 proposal, which would have applied beyond U.S. embassy and consular properties.

Judge Bucklew stated that the primary issue raised about the current proposal concerned its inclusion of American Samoa. The Pacific Islands Committee of the Ninth Circuit had suggested that if an amendment were to be made, it should be reviewed first by the judiciary of the territory and have the support of the Chief Justice of the High Court of American Samoa. This course of action would be consistent with long-standing practice based on the original treaties between the United States and American Samoa. Therefore, for purposes of public comment, the advisory committee had included American Samoa in brackets in the published text. Nevertheless, she said, the only comment responding to the issue had been made by the Federal Magistrate Judges Association, which saw no need to exclude American Samoa. In addition, the Department of Justice continued to express support for the proposal, noting that the current status was adversely affecting its law-enforcement efforts.

Judge Bucklew reported that the advisory committee had contacted the Pacific Islands Committee of the Ninth Circuit and explained that American Samoa would need to comment on the proposal if it wished to be excluded from the rule. But no communication had been received. Therefore, the advisory committee approved the rule without excluding American Samoa.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 45

Judge Bucklew reported that the proposed amendment to Rule 45 (computing time) was purely technical in nature. As part of the recent restyling of the Federal Rules of Civil Procedure, some subdivisions of the civil rules governing service had been re-numbered. As a result, cross-references in FED. R. CRIM. P. 45(c) to various provisions of the civil rules will become incorrect when the restyled civil rules take effect on December 1, 2007. Therefore, the advisory committee recommended amending Rule 45(c) to reflect the re-numbered civil rules provisions. Because the amendment is purely technical, she said, the advisory committee suggested that there would be no need for publication.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had voted to recommend publishing a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeaching evidence favorable to the defendant. She traced the history of the proposal, beginning with a position paper submitted by the American College of Trial Lawyers in 2003. The College argued that unlawful convictions and unlawful sentencing have occurred because prosecutors have withheld exculpatory and impeaching evidence.

Judge Bucklew emphasized that the advisory committee had devoted four years of intensive study to refining the substance and language of the proposed amendment. She pointed out that the rule eventually approved by the advisory committee was considerably more modest than the changes recommended by the College, which had called for more extensive amendments both to Rule 16 and Rule 11 (pleas). The committee, she said, had debated and rejected proceeding with any amendments to Rule 11.

Judge Bucklew noted that the Federal Judicial Center had prepared an extensive report for the advisory committee in 2004 surveying all the local rules and standing orders of the district courts in this area. At the committee's request, the Center then updated the document on short notice in 2007. The report revealed that 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of *Brady* materials. She explained, however, that the Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. In addition, she said, most states have statutes or court rules governing disclosure.

The advisory committee, she said, had also reviewed a wealth of other background information, including a summary of the case law addressing *Brady v. Maryland* issues, pertinent articles on the subject, the American Bar Association's model rules of professional conduct governing the duty of prosecutors to divulge exculpatory information, and correspondence from the federal defenders.

Judge Bucklew reported that the Department of Justice strongly opposed the proposed amendment. In light of that opposition, she noted, former committee member Robert Fiske had suggested that in lieu of pursuing a rule amendment, it might be more practical for the committee to encourage the Department to make meaningful revisions in the U.S. Attorneys' Manual to give prosecutors more affirmative direction regarding their *Brady* obligations.

As a result of the suggestion, she said, the Department did in fact amend the manual to elaborate on the government's disclosure obligations. Judge Bucklew thanked the Department on behalf of the advisory committee for its excellent efforts in this respect. She gave special recognition to Assistant Attorney General Alice Fisher for leading the efforts and emphasized that the entire advisory committee believed that the changes had improved the manual substantially.

Nevertheless, she added, the advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change. First, as a practical matter, the committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases. Second, the U.S. Attorneys' Manual is a purely internal document of the Department of Justice and not judicially enforceable.

Judge Bucklew added that the reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld. She said that the advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment. In the letter, the judge claimed that in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the Department of Justice failed to discipline the attorney appropriately for the breach of *Brady* obligations.

Judge Bucklew stated that there are numerous cases in which courts have found that the prosecution had failed to disclose exculpatory material – if one includes cases in which the failure to disclose did not rise to constitutional dimensions and therefore did not technically violate the constitutional requirements of *Brady v. Maryland.* Beyond that, she said, it is simply impossible to know how many failures actually occur because only the prosecution itself knows what information has not been disclosed.

Judge Bucklew observed that the local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense. Some rules, for example, impose a "due diligence" requirement on prosecutors, while others do not. She added that the sheer number of local rules, together with the lack of consistency among them, argue for a national rule to provide uniformity. Moreover, just publishing a proposed rule for comment, she added, could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.

Professor Beale observed that two central trends currently prevail in the criminal justice system: (1) to recognize and enhance the rights of crime victims; and (2) to reduce

the incidence of wrongful convictions. The proposed rule, she said, would advance the second goal. It would also promote judicial efficiency by regulating the timing and nature of the materials to be disclosed.

The proposed amendment, she said, would require the government to disclose not just "evidence," but "information" that could lead to evidence. It also would require a defendant to make a request for the information. It speaks of information "known" to the prosecution, including information known by the government's investigative team. She noted that this provision was consistent with a line of *Brady* cases requiring disclosure of matters known not just to attorneys but also to law enforcement agents. She added that the Department of Justice was deeply concerned about the breadth of this particular formulation.

Professor Beale reported that a great deal of the advisory committee's discussion had focused on the need to have *Brady* materials disclosed during the pretrial period, rather than on the eve of trial. So, for purposes of timing, the proposed rule distinguishes between exculpatory and impeaching information. Impeaching evidence generally relates to testimony, and the Department is concerned that early disclosure increases potential dangers to witnesses. Therefore, the proposed amendment specifies that a court may not order disclosure of impeaching information earlier than 14 days before trial. That particular timing, she said, is more favorable to the prosecution than the current limits imposed by many local court rules. Moreover, the government has the option of asking a judge to issue a protective order in a particular case when it has specific concerns about disclosure.

Professor Beale reported that the Department had argued that the proposed rule is inconsistent with *Brady v. Maryland.* But, she said, the advisory committee was well aware that the proposed amendment is not compelled by *Brady.* Rather, *Brady* and related cases set forth only the minimal constitutional requirements that the government must follow. The proposed amendment, by contrast, goes beyond what the Supreme Court has said is the minimum that must be turned over. Moreover, it would provide consistent procedural standards for the turnover of exculpatory information.

Professor Beale explained that the advisory committee saw no need to include in the rule a definition of "exculpatory" or "impeaching" evidence. The amendment also does not require that the information to be turned over be "material" to guilt in the constitutional sense, such that withholding it would necessitate reversal under *Brady.* Professor Beale explained that the advisory committee did not want to use the word "material" because it might be read to imply all the familiar constitutional standards. She noted that other parts of Rule 16 use the term "material" in a different sense, referring to information "material" to the preparation of the defense.

Professor Beale stated that the proposed amendment would establish a consistent national procedure and bring the federal rules more in line with state court rules and the rules of professional responsibility. It would also introduce a judicial arbiter to make the final decision as to what must be disclosed. Accordingly, she said, the key dispute over the proposed amendment is whether the policy and practice it seeks to promote should be enforced through the U.S. Attorneys' Manual or a federal rule of criminal procedure.

Deputy Attorney General McNulty thanked Judge Bucklew and the advisory committee for working cooperatively and openly with the Department of Justice on the proposed rule. He pointed out that the Department had set forth its position in considerable detail in a memorandum recently submitted to the committee.

He emphasized the central importance of Rule 16 to prosecutors, and he pointed to the recent revisions in the U.S. Attorneys' Manual as tangible evidence of the Department's willingness to address the concerns expressed by the advisory committee and others and to ensure compliance with constitutional standards. He said, though, that the proposed amendment was deeply disturbing and would fundamentally change the way that the Department does business.

Mr. McNulty argued that there was simply no need for the amendment because the Constitution, Congress, and the Supreme Court have all specified the requirements of fairness and the obligations of prosecutors. All recognize the balance of competing interests. But the proposed rule, he said, goes well beyond what is required by the Constitution and federal statutes, and it would upset the careful balance that Congress and the courts have established.

The disclosure obligations proposed in the amendment, he said, also conflict with the rights of victims. The rule would move the Department of Justice towards an open file policy and make virtually everything in the prosecution's files subject to review by the defense, including information sensitive to victims, witnesses, and the police. In cases involving a federal-state task force, moreover, it might require that state information be turned over to the defense, in violation of state law. The amendment, also, he said, is inconsistent with the Jencks Act, with the rest of Rule 16, and with other criminal rules limiting disclosure and the timing of disclosure.

The proposed amendment, he added, would inevitably generate a substantial amount of litigation on such matters as whether exculpatory or impeachment information is "material." There is some question, he said, whether the rule removes "materiality" as a disclosure standard or whether it contains some sort of back-door materiality standard. At the very least, he said, the rule has not been thought through or studied adequately. In the final analysis, moreover, the rule will not achieve the goal of its proponents to prevent

abuses and miscarriages of justice because an unethical prosecutor determined to withhold specific information will find a way to avoid any rule.

Mr. McNulty concluded his presentation by emphasizing that the case for a rule change had not been made, and the proposed amendment should be rejected. Moreover, the significant revisions just made to the U.S. Attorneys' Manual should be given time to work. In the alternative, he said, the rule could be sent back to the advisory committee to work through the many difficult issues that have not yet been resolved.

Assistant Attorney General Fisher added that the advisory committee had made a conscious decision not to include a materiality standard in the amendment. In that respect, she said, the proposal is inconsistent with current local court rules, very few of which have eliminated the materiality requirement. It would also be inconsistent with the rest of Rule 16 in that respect. And it would undercut the rights of victims and their ability to rely on prosecutors to protect them. The proposal, in short, would create major instability and insecurity among witnesses, who will be less willing to come forward.

The committee chair suggested that the proposed amendment was not yet ready for publication, and he observed that the changes in the U.S. Attorneys' Manual were a very important achievement that should be given time to work Another member added that his district has an open file system that works very well. But, he said, it would be very helpful to obtain reliable empirical evidence to support the need for a change. The Department of Justice, he said, had done an excellent job in producing a detailed set of revisions to the prosecutors' manual. In the face of that achievement, he said, the committee should give the Department the courtesy of seeing whether or not the manual changes make a difference before going forward with a rule amendment that contains a major change in policy. He noted that there may well be problems in monitoring the impact of the manual changes but suggested that the committee work with the Department to explore practical ways to measure the impact of the manual changes.

Another member agreed and added that the essential impact of the proposed amendment will be to change the standard of review for failure to disclose – a very significant change. Professor Beale responded that the purpose of the amendment was not to change the standard of review, but to change pretrial behavior and provide clear guidance on what needs to be disclosed. She explained that in civil cases the parties are entitled to a great deal of discovery early in a case. In federal criminal cases, however, defendants often have to wait until trial before obtaining certain essential information. That, she said, is a glaring difference. She added that a court is more likely to require government disclosure at trial if it is required by Rule 16, and not just by the constitutional case law.

Another member stated that the proposed amendment would do far more than change the standard of review. It would, he said, radically expand the defendant's rights to pretrial discovery – a fundamentally bad idea. As drafted, he said, the rule has major flaws, and if published, the public comments will be completely predictable. The defense side will strongly favor an amendment that radically expands its pretrial discovery. The Department of Justice, on the other hand, will vigorously oppose the change.

He predicted that if the amendment were forwarded by the committee to the Judicial Conference, it would likely be rejected by that body. And if it were to reach the Supreme Court, it might well be rejected by the justices. Proceeding further with the proposed amendment, he said, would do irreparable damage to the reputation of the Standing Committee as a body that proceeds with caution and moderation. He added that there is nothing wrong with controversy *per se*, but the proposed rule is both controversial and wrong.

The amendment, he argued, takes a constitutional-fairness standard and converts it into a pretrial discovery procedure that gives the defense new trial-preparation rights. The case, he said, had not been made that the rule is necessary or that violations of disclosure obligations by prosecutors cannot be handled adequately by existing processes. He added that the most radical effect of the rule is found not in the text of the rule itself, but in the committee note asserting that the current requirement of materiality would be eliminated and that all exculpatory and impeachment information will have to be turned over to the defense, whether or not material to the outcome of a case.

Another member concurred and explained that when the Standing Committee agrees to publish a rule, there is an understanding that it has been vetted thoroughly. Publication, moreover, carries a rebuttable presumption that the proposal enjoys the committee's tentative approval on the merits. But, he said, the proposed amendment to Rule 16 does not meet that standard. The Rules Enabling Act process is structured to ensure that the Executive Branch has an opportunity to be heard. In this instance, he argued, the Executive Branch has expressed serious opposition to the proposal. Thus, with controversial proposals such as this, he argued, the committee owes it to the Judicial Conference, the Supreme Court, Congress, and the bench and bar generally that the rule is substantially ready when published.

One of the judges pointed out that his court's local rules require that information be disclosed before trial if it is material. He emphasized that if the committee were to approve an amendment, it should include a materiality standard. Without it, he said, courts will be inundated with essentially meaningless disputes over whether immaterial information must be turned over. The proposed rule, he argued, would also conflict with the Jencks Act and with constitutionally sound principles. He urged the committee to reject the amendment. Alternatively, he suggested that if the committee believes it

necessary to produce a rule to codify *Brady,* it should at least incorporate a materiality requirement.

Another member agreed with the criticisms expressed, but suggested it would be useful to have a uniform rule for the federal courts to provide greater guidance on B*rady* issues. The *Brady* standard, he said, applies after the fact. It is not really a discovery standard, but a sort of harmless error standard on appeal.

He said that the proposed amendment would represent a radical change for the federal courts. But, on the other hand, it would bring federal practice closer to that of the state courts. He noted that many believe that the state courts strike a fairer balance between giving defendants access to information and protecting witnesses and victims against harmful disclosures. He said that additional review of state and local practices might be useful.

Another member concurred in the criticisms of the amendment but said that the central issue before the Standing Committee was whether to publish the rule for public comment. Comments, he suggested, could be very useful. He noted that the proposal had been approved by the advisory committee on an 8-4 vote, demonstrating substantial support for it and arguing for publication. Moreover, he said, empirical research is very difficult to obtain in this area because the defense never finds out about material improperly withheld by prosecutors. He added that current practice under *Brady* is self-serving because it is only natural for a prosecutor in the middle of a case to convince himself or herself that a particular statement is not material. He concluded that disclosure of exculpatory and impeaching information is a matter that needs to be addressed, and the public comment period should be helpful in shedding light on current practices.

He expressed some skepticism regarding revisions to the U.S. Attorneys' Manual. For decades, he said, the Department of Justice has insisted that the manual is not binding, but it is now characterizing the recent changes on *Brady* materials as crucial. He was concerned, too, that the manual could be changed further at any time in the future.

Another participant concurred that quantitative information is difficult to obtain and suggested that the committee could gather a good deal more anecdotal information through interviews with judges, lawyers, and former prosecutors. If that were done, he said, it would be important to identify the nature of the criminal offense involved because it may turn out that disclosure is not handled the same way in different types of cases.

The committee's reporter stressed the importance of protecting the integrity and credibility of the Rules Enabling Act process. He said that the committee should proceed with caution and not risk its credibility by publishing a proposed amendment that is very controversial and not supported by sufficient research. He suggested that the rule be

deferred and the committee consider asking the Federal Judicial Center to conduct additional research.

Judge Hartz moved to reject the amendment outright and not to send it back to the advisory committee for further review. He suggested that the debate appeared to come down to an ideological difference of opinion over what information should be disclosed by prosecutors to defendants. The dispute, he said, is not subject to meaningful empirical investigation, and it would not be a good use of resources to return the matter to the advisory committee or to ask the Federal Judicial Center for further study.

Judge Bucklew said that the advisory committee had spent four years on the proposal and had discussed it at every committee meeting. A majority of the committee, she explained, believed strongly that the proposal was the right and fair thing to do. She agreed, though, that it was hard to see what good additional research, including anecdotal information, would produce. Therefore, she said, if the Standing Committee were to disagree with the merits of the proposal, it should simply reject the rule and not send it back to the advisory committee nor keep it on the agenda.

Professor Beale added that the advisory committee could continue to work on refining the proposal or conduct additional research, if that would help. But, she said, if the Standing Committee were to conclude that the amendment is fundamentally a bad idea in principle, it would ultimately be a waste of time to attempt to obtain more information.

She noted that conditions and prosecution policies vary enormously among judicial districts. In some districts, disclosure seems not to be a problem, but in others there may have been improper withholding of information. A study could be crafted to examine the differences among the districts and ascertain why there are disclosure problems in some districts, but not others. In the final analysis, though, if it appears that the Standing Committee will still oppose any amendment – even after additional research and tweaking – it would be wise just to end the matter and not expend additional time and resources on it.

One member suggested that it would be helpful to survey lawyers and judges on disclosure in practice. He pointed to the influential and outcome-determinative research conducted for the committee by the Federal Judicial Center in connection with FED. R. APP. P. 32.1, governing unpublished opinions. By analogy to that successful research effort, he recommended that more research be conducted – unless the committee concludes as a matter of policy that no amendment to Rule 16 would be acceptable.

Another member stated that he worried about the message the committee would send the bar by rejecting an amendment to Rule 16 out of hand. He noted that the bar is concerned that prosecutors do not always disclose information that they should. He

commended the Department of Justice for its good faith efforts to work with the committee and recommended that, rather than rejecting the proposed amendment outright, the matter be returned to the advisory committee to monitor the impact of the recent changes in the U.S. Attorneys' Manual.

The committee chair noted that there are many different local rules governing disclosure of exculpatory and impeachment information. With regard to the Federal Rules of Civil Procedure, he explained that the committee had found the lack of uniformity among districts to be intolerable. Consistency, he said, is very important to the unity of the federal judicial system. A defendant's right to exculpatory information should not vary greatly from court to court. Thus, if there is to be a national rule to codify *Brady* obligations, it should contain a clear standard. There is, he said, little support for a national open-file rule, but achieving consensus on the right balance would be very complex and difficult.

The chair suggested that there are various ways to elicit meaningful information from the legal community other than by publishing a rule or asking the Federal Judicial Center for additional research. He noted, for example, that the Advisory Committee on Civil Rules had conducted a number of conferences with the bar on specific subjects, and the committee's reporter had sent memoranda to the bar seeking views on discrete matters. He concluded that the Standing Committee should not tell the advisory committee that criminal discovery is off the table. It is, he said, a topic that needs further study. But the advisory committee should proceed slowly and methodically with any study.

Two members agreed that there is room for continuing study and input from bench and bar regarding pretrial discovery, the conduct of prosecutors, and uniformity among the districts. Nevertheless, they recommended that all work cease on the pending amendment to Rule 16 because it is too radical and cannot be fixed. Another member agreed that the proposed amendment is not the right rule, but suggested that the issues it raises are very important and need to be considered further. He said that there is room for further research and analysis to see whether a consensus can be developed on a uniform rule for the entire federal system. Thus, he recommended that the proposal be returned to the advisory committee, but not rejected outright.

Deputy Attorney General McNulty observed that even if the Standing Committee rejects the proposal, the advisory committee could still continue to explore the issues on its own in a slow and methodical manner. Slowing down the process, he said, was important to the Department, which has been concerned that it must continue to stay on the alert because the proposed amendment could resurface in revised form.

Judge Thrash observed that a consensus appeared to have emerged not to publish the proposed amendment, but to defer further consideration of it indefinitely, with the

understanding that the advisory committee will be free to study the topic matter further and take such further action as it deems appropriate at some future date. **He offered this course of action as a substitute motion for Judge Hartz's motion, with Judge Hartz's agreement.**

Deputy Attorney General McNulty agreed and added that the advisory committee would not be proceeding under any expectation as to when, if ever, the issue should come back to the Standing Committee.

The committee with one objection voted by voice vote to adopt Judge Thrash's substitute motion.

FED. R. CRIM. P. 7, 32, and 32.2

Professor Beale reported that the proposed amendments to Rules 7 (indictment and information), 32 (sentence and judgment) and 32.2 (criminal forfeiture) would clarify and improve the rules governing criminal forfeiture. She noted that the amendments were not controversial, and they had been approved unanimously by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee recommended publishing proposed amendments to Rule 41 (search and seizure) to govern searches for information stored in electronic form. The amendments would acknowledge explicitly the need for a two-step process – first, to seize or copy the entire storage medium on which the information is said to be contained, and, second, to review the seized medium to determine what electronically stored information contained on it falls within the scope of the warrant.

Judge Bucklew explained that the search frequently occurs off-site after the computer or other storage medium has been seized or copied by law enforcement officers. She added that the revised rule specifies that in the case of seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

RULE 11 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

Professor Beale explained that the proposed companion amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings (certificate of appealability and motion for reconsideration) would provide the procedure for a litigant to seek reconsideration of a district court's ruling in a habeas corpus case. They would specify that a petitioner may not seek review through FED. R. CIV. P. 60(b) (relief from judgment or order).

She reported that the advisory committee had considered a much broader proposal by the Department of Justice to eliminate coram nobis and other ancient writs, but it had decided on fundamental policy grounds against the change. Instead, the committee's proposal specifies that the only procedure for obtaining relief in the district court from a final order will be through a motion for reconsideration filed within 30 days after the district court's order is entered.

A member observed that the proposed amendment may narrow the scope of reconsideration in a way that the advisory committee did not intend. He noted that proposed Rule 11(b) may preclude the use of FED. R. CIV. P. 60(a) to seek reconsideration based on a clerical error – relief most often sought by the government. He suggested that the proposed rule may not be needed, and the stated justification for it was confusing. He also questioned whether the proposed rule did what it was intended to do, namely codify the Supreme Court's decision in *Gonzalez v. Crosby*. And he objected to the proposed 30-day time limit on the grounds that an unrepresented pro se litigant should not face a shorter time-limit than others.

Judge Levi asked whether, given these concerns, the advisory committee would be willing to hold the proposal for possible publication at a later time. Judge Bucklew agreed to recommend that only the proposed amendment to Rule 11(a) be published for public comment, and that the remainder of the rule be deferred for further consideration by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments to Rule 11(a) of both sets of rules for publication and to defer consideration publishing the proposed amendments to Rule 11(b) of both sets of rules.

Professor Struve noted that if the proposed amendment to Rule 11(b) did not go forward for publication, the Standing Committee should also not publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A), which makes reference to the proposed new Rule 11(b). **Accordingly, the committee voted unanimously by voice vote not to publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A).**

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59
RULE 8 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

As noted above on pages 10-11, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Criminal Procedure.

Informational Items

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee had decided not to submit to the Standing Committee any proposed amendments to FED. R. CRIM. P. 29 (motion for a judgment of acquittal). The proposal published by the committee would have required a judge to wait until after a jury verdict to direct a verdict of acquittal unless the defendant were to waive his or her double jeopardy rights and give the government an opportunity to appeal the pre-verdict acquittal.

She noted that there had been a good deal of public comment on the proposal, most of it in opposition. Several different grounds had been offered for the objections – most noticeably that the amendments would exceed the committee's authority under the Rules Enabling Act, impose an unconstitutional waiver requirement, fail to provide needed flexibility to sever multiple defendants and multiple counts when necessary, and intrude on judicial independence. Several comments added that the proposed amendments were simply not needed because directed acquittals are rare in practice.

Judge Bucklew reported that the advisory committee first had voted 9 to 3 to reject the proposed rule, and then it voted 7 to 5 to table it indefinitely and not continue working on it. She added that most members of the advisory committee had simply not been convinced that a sufficient showing of need had been made to justify moving forward a proposal in the face of the many different objections raised.

A member explained that the Department of Justice had cited as a need for the rule several examples of pre-verdict acquittals that the Department considered improper. But, he said, research set forth in the committee materials suggested that the acquittals in those particular cases, upon closer examination, appear to have been justified. Professor Beale explained that the materials included a letter from the federal defenders containing detailed transcript quotations and references to demonstrate the reasons for the pre-verdict acquittals in those cases. This letter, she said, had had a large impact on the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2007 (Agenda Item 6).

Amendment for Final Approval of the Judicial Conference

FED. R. EVID. 502

Judge Smith reported that the advisory committee's primary impetus in proposing new Rule 502 (waiver of attorney-client privilege and work-product protection) was to address the high costs of discovery in civil cases. He explained that if the rules governing waiver were made more uniform, predictable, and relaxed, attorneys could reduce the substantial efforts they now expend on privilege review and decrease the discovery costs for their clients. Lawyers today, he said, must guard against the most draconian federal or state waiver rule in order to protect their clients fully against the danger of inadvertent subject-matter waiver.

Judge Smith added that national uniformity is greatly needed in this area. The bar, he said, has been strongly supportive of the proposed new rule, and their comments have been very useful in improving the text. He explained that proposed Rule 502(b) specifies that an inadvertent disclosure will not constitute a waiver if the holder of the privilege or protection acts reasonably to prevent disclosure and takes reasonably prompt measures to rectify an error. Subject-matter waiver will occur only when one side acts unfairly and offensively in attempting to use a privilege waiver as to a particular document or communication.

Professor Capra added that the bar believes strongly that the rule will be very beneficial. It would provide national uniformity and liberalize the current waiver standard in the federal courts. He noted that the text had been refined further since the April 2007 advisory committee meeting in response to suggestions from a Standing Committee member and the Style Subcommittee.

Professor Capra noted that Rule 502(c) deals with disclosure and waiver in state-court proceedings. He pointed out that the advisory committee had been very sensitive to federal-state comity concerns and had revised the rule to take account of comments made by the Federal-State Jurisdiction Committee of the Judicial Conference and state chief justices.

He emphasized that the rule will provide protection in state proceedings and, indeed, must do so in order to have any real meaning. But, he said, the rule does not explicitly address disclosures first made in the course of state-court proceedings. Thus, if a party seeks to use in a federal proceeding a disclosure made in a state proceeding, the federal rule will not necessarily govern. Rather, the most protective rule would apply, *i.e.*, the one most protective of the privilege.

Professor Capra explained that Rule 502(d) is the heart of the new rule. It specifies that a federal court's order holding that a privilege or protection has not been waived in the litigation before it will be binding on all persons and entities in all other proceedings – federal or state – whether or not they were parties to the federal litigation. Rule 502(e) provides that parties must seek a court order if they want their agreement on the effect of disclosure to be binding on third parties.

Professor Capra reported that the Department of Justice had expressed concern over the committee's decision to extend Rule 502(b) to inadvertent disclosures made "to a federal office or agency," as well as "in a federal proceeding." He noted that members of the bar had argued that the cost of pre-production review of materials disclosed to a federal agency can be just as great as that before a court.

He explained that the Department of Justice was concerned that an Executive Branch officer does not generally know whether there has been a waiver. A matter before an agency is not yet a "proceeding," and there is no judge to whom the agency can go for a ruling on waiver. As a practical matter, then, an agency may get whip-sawed later if a party claims that it did not intend to waive protection or privilege. That scenario may occur now, but the Department believes that it is likely to happen more often under the proposed rule. He noted that the advisory committee was aware of the Department's concerns, but it was willing to accept that risk in return for the benefits of reducing the costs of discovery before government agencies.

Professor Capra reported that, as published, the rule had set forth in brackets a provision governing "selective waiver." The bracketed selective waiver provision had specified that disclosure of protected information to a federal government agency exercising regulatory, investigative, or enforcement authority does not constitute a waiver of attorney-client privilege or work-product protection as to non-governmental persons or entities, whether in federal or state court.

Professor Capra pointed out that the advisory committee had not voted affirmatively for the provision, but had included it for public comment at the request of the former chairman of the House Judiciary Committee. During the comment period, he said, the provision had evoked uniform and strong opposition from the bar, largely on the grounds that it would further encourage a "culture of waiver" and weaken the attorney-

client privilege. On the other hand, he said, representatives of government regulatory agencies supported the selective waiver provision.

Professor Capra said that, as a result of the public comments, the advisory committee had decided that selective waiver was essentially a political question and should be removed from the rule. Instead, it agreed to prepare a separate report for Congress containing appropriate statutory language that Congress could use if it wanted to enact a selective waiver provision. The draft letter, he said, would state that the committee's report on selective waiver is available on request if Congress wants it. Professor Capra emphasized that the advisory committee did not want to let a controversial issue like selective waiver detract from, or interfere in any way with, enactment of the rest of the proposed new rule, which is non-controversial and will have enormous benefits in reducing discovery costs.

A member asked what good it does, once a disclosure in a state proceeding has been found to have waived the privilege in that state proceeding, for the privilege to be found protected in a later federal proceeding. As a practical matter, the disclosed information is already out. Professor Capra responded that the advisory committee had discussed these issues with the Conference of Chief Justices and had reached an agreement that the federal rule would apply if more protective of the privilege than the applicable state rule. In fact, though, most states have a rule on inadvertent disclosure similar to the proposed new federal rule, and the rule of some states is more protective of the privilege. Given those circumstances, he said, the concern may be largely theoretical. He added that it would be very complex to apply a state law of waiver that is *less* protective of the privilege than the federal rule. The proposed new rule would avoid that situation.

A member pointed out that even though the advisory committee had decided that the proposed new rule would not address the matter, selective waiver is still present. As a practical matter, once there is a federal judicial proceeding involving the federal government, proposed Rule 502(d) may function as a mechanism for a selective waiver. For example, a party may permit a document to be disclosed to its federal government opponent. Even if the privilege is found waived as to that document, there will not be a subject-matter waiver unless the exacting requirements of Rule 502(a) are met. If the court rules that there is no subject-matter waiver, the ruling will be binding in later proceedings under Rule 502(d). Thus, the new rule will give the government an incentive to initiate a judicial proceeding in the hope of extracting what would amount to a selective waiver.

Mr. Tenpas observed, regarding selective waiver, that the Department has been told for years by parties under investigation that they would like to turn over specific documents to the government, but could not afford to do so for fear of waiving the

privilege as to everybody else. Ironically, he said, the same people now say that they are strongly opposed to a selective waiver rule.

He added that the Department would prefer that the rule proceed to Congress with a selective waiver provision included. He wanted to make sure that the issue is preserved and that the Department's support for sending the rest of the rule forward is not interpreted as a lack of support for selective waiver.

A member stated that he was distressed by the length of the proposed committee note. He said that it reads like a law review article and should be cut substantially. Professor Capra responded that a longer note was needed in this particular instance because it will become important legislative history when the rule is enacted by Congress. Another member pointed out that committee notes help to explain the rationale for a rule during the public comment process. But once the rule is promulgated, it might be better to have a shorter note on the books. He suggested that the note might be made shorter and some of its points transferred to a covering letter to Congress.

Professor Capra observed that when Congress enacted FED. R. EVID. 412 (relevance of alleged victim's past sexual behavior or predisposition) it had declared that the committee note prepared by the rules committees would constitute the legislative history of the statute. Congress, he said, could do the same thing with the proposed new Rule 502. That possibility, he said, would argue for a relatively lengthy note. He further commented that the signals the advisory committee reporters receive from the Standing Committee are not uniform as to what the committee notes are supposed to do. In any event, he said that he would cut back the length of the note in response to the members' comments.

Professor Coquillette added that committee notes often become fossilized over time. Statements that are very useful at the time a rule is adopted can, several years later, become unnecessary, disconnected, or wrong. The rules committees, however, cannot change a note without changing the rule. Also, he said, some lawyers only use the text of the rule, and they do not have ready access to committee notes and the treatises.

A member questioned the language of proposed Rule 502(b)(2) that the holder of a privilege must take "reasonable steps" to prevent disclosure. The whole point of the rule, he said, is that in a big document-production case an attorney need not search each and every document to uncover embedded privilege issues. But what, in fact, constitutes the "reasonable steps" that the attorney must take? He pointed out that he personally would avoid problems by reaching an early agreement in every case with his opponent to address inadvertent waiver. Professor Capra responded, however, that not every party can obtain such an agreement. Moreover, an attorney cannot know for certain in advance that he or

she will reach an agreement with the opponent or be able to obtain a court order. He predicted that in time, few issues will arise under the language of Rule 502(b).

Mr. Tenpas explained further the Department of Justice's concern over extending the inadvertent waiver provision to documents turned over "to a federal office or agency." He explained that the Department was well aware that it is very expensive for a party to conduct privilege review of documents given to a federal agency, just as it is in litigation before a court. The proposed new rule, therefore, is designed to change parties' conduct in this regard, and reduce the costs of privilege review.

The problem for the government, though, is that the federal office or agency does not know whether a disclosure will constitute a waiver until it can obtain a ruling from a judge in some future litigation. He recognized that that is also the case now. But he argued that no one knows how many more privileged documents will slip through under the new rule, as compared to the current regime. The Department, he said, was concerned that it will occur more frequently under the proposed rule.

He suggested that it would make sense at this point to limit the new rule to federal court proceedings only. The committee could at a later date consider whether to extend it to documents disclosed to federal regulators.

Mr. Tenpas moved to amend proposed Rule 502(b) by striking from line 18 the words "or to a federal office or agency."

A member noted that consideration of proposed Rule 502 is different from the committee's usual rulemaking process because any rule pertaining to privileges must be affirmatively enacted by Congress. This circumstance creates practical problems if the committee wants to make additional changes later in light of experience under the rule. The committee could not then merely make changes through the rulemaking process, but would have to return to Congress for a further statutory amendment. This, he said, is an argument against making the change that the Department of Justice urges, i.e., deleting "or to a federal office or agency."

Judge Smith stated that the issue of including "a federal office or agency" in the inadvertent disclosure provision was not a deal-breaker for the advisory committee. The public comments, he said, had made it clear that something needs to be done as soon as possible to reduce the costs of privilege review in discovery. Thus, getting a new Rule 502 enacted by Congress is the main goal. Beyond that, he said, the rule should cover as many contexts as possible.

Mr. Tenpas stated that the main focus of the proposed rule is on litigation in court, not on dealings with federal agencies. Productions of documents to federal agencies

outside litigation, he argued, do not entail huge document productions nearly so often as in litigation.

The committee voted by voice vote, with two objections, to deny the motion to strike the words "or to a federal office or agency."

Judge Hartz moved to approve Rule 502, subject to possible further refinements in the language regarding state proceedings.

Judge Levi stated that the proposed new rule is extremely important and will reduce the cost of litigation in a significant way. He recognized that the Department of Justice has had concerns about applying the rule's inadvertent waiver principles to documents disclosed "to a federal office or agency." Nevertheless, he implored the Department not to allow its opposition to that particular provision to be interpreted by Congress in any way as opposition to the rule. He said that Congress must not be sent signals that the rule is either complicated or controversial. To the contrary, he said, the public comments had demonstrated that the rule is universally supported, very important, and urgently needed. Mr. Tenpas responded that the Department of Justice would vote in favor of the proposed new rule.

The committee without objection by voice vote agreed to send the proposed new rule to the Judicial Conference for final approval.

ADAM WALSH CHILD PROTECTION ACT

Professor Capra reported that the Adam Walsh Child Protection and Safety Act of 2006 directed the committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse."

Professor Capra pointed out that the Congressional reference had been generated by concern over a 2005 decision in the Tenth Circuit. The court in that case had refused to apply a harm-to-child exception to the adverse testimonial privilege. The defendant had been charged with abusing his granddaughter, and the court upheld his wife's refusal to testify against him based on the privilege protecting a witness from being compelled to testify against her spouse.

Professor Capra explained that the decision is the only reported case reaching that conclusion, and it does not even appear to be controlling authority in the Tenth Circuit. Moreover, there are a number of cases from the other circuits that reached the opposite

conclusion. He said that the advisory committee had decided that there was no need to propose an amendment to the evidence rules to respond to a single case that appears to have been wrongly decided. He added that that the committee had been unanimous in its decision not to recommend a rule, although the Department of Justice saw the enactment of a statute at the initiative of Congress as raising a different question.

Professor Capra reported that the advisory committee had prepared a draft report for the Standing Committee to send to Congress concluding that an amendment to the evidence rules is neither necessary nor desirable. At the request of the Department, however, the report also included suggested language for a statutory amendment should Congress decide to proceed by way of legislation. Mr. Tenpas added that cases involving harm to children are a growing part of the Department's activity, and the Department likely would not oppose a member of Congress introducing the draft rule language as a statute.

The committee without objection by voice vote approved the report for submission to Congress.

Informational items

Professor Capra reported that the advisory committee would begin the process of restyling the evidence rules in earnest at its November 2007 meeting. He noted that Professor Kimble, the committee's style consultant, was already at work on an initial draft of some rules.

Professor Capra said that the advisory committee had decided to defer considering any amendments to the evidence rules that deal with hearsay in order to monitor case law development following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that earlier in the current term, the Court had ruled that if a hearsay statement is not testimonial in nature, there are no constitutional problems with admitting it. As a result, the advisory committee might begin to look again at possible hearsay exceptions.

REPORT ON STANDING ORDERS

Professor Capra said that Judge Levi had asked him to prepare a preliminary report on the proliferation of standing orders and how and whether it might be possible to regulate standing orders. He thanked Jeffrey Barr and others at the Administrative Office for gathering extensive materials on the subject for him.

He noted that standing orders are general orders of the district courts. But the term is also used to include the orders of individual judges. In addition, the difference between local rules and standing orders is not clear, as subject matter appearing in one court's local rules appears in another's standing orders. In some instances, standing orders abrogate a local court rule, and some standing orders conflict with national rules.

Standing orders, unlike local rules, do not receive public input. They are easier to change but are not subject to the same review by the court or the circuit council. They are also harder for practitioners to find, as they are located in different places on courts' local web sites. Some courts, moreover, do not post standing orders, and many judges do not post their own individual orders. And the courts' web sites do not have an effective search function.

Professor Capra suggested that one question for the Standing Committee was to decide what can, or should, be done about the current situation. A few districts, he said, had made some attempt to delineate the proper use of standing orders, such as by limiting them to administrative matters and to temporary matters where it is difficult to keep up with changes, such as electronic filing procedures. He suggested that another approach would be to include basic principles in a local court rule and supplement them with a more detailed local practice manual.

Professor Capra pointed out that his preliminary report had set forth some suggestions as to the role that the Standing Committee might assume vis a vis standing orders. One possibility would be to initiate an effort akin to the local-rules project to inform the district courts of problems with their standing orders. But, he said, that course would require a massive undertaking. Another approach would be to focus only on those orders that conflict with a rule. Alternatively, the committee could list the topics that should be included in local rules and those that belong in standing orders. In addition, the committee might address best practices for local court web sites.

Members said that Professor Capra's report was excellent and could be very helpful to judges and courts. One suggested that the Judicial Conference should distribute the report to the courts and adopt a resolution on standing orders. Judge Levi added that the report was not likely to encounter much resistance because it does not tell courts what to do, but just recommends where information might be placed in rules or orders. He suggested that the report be presented at upcoming meetings of chief district judges and the district-judge representatives to the Judicial Conference. Finally, Judge Levi recommended that his successor as committee chair consider the best way to make use of the report.

REPORT ON SEALING CASES

Mr. Rabiej reported that the Executive Committee of the Judicial Conference had asked the rules committees, in consultation with other Conference committees, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed for regulating and limiting the sealing of entire cases. He noted that there had been problems in a handful of courts regarding the docketing of sealed cases. The electronic dockets in those courts had indicated that no case existed, and gaps were left in the sequential case-numbering system. This led some to criticize the judiciary and accuse it of concealing cases. Corrective action has been taken, in that the electronic docket now states that a case has been filed, but sealed by order of the court.

Mr. Rabiej said that a complete solution to the problems of sealed cases may require a statute. Judge Levi decided to appoint a subcommittee, chaired by Judge Hartz and including members of other Conference committees, to study the matter and respond to the request of the Seventh Circuit. He said that a representative from each of the advisory committees should be included on the new subcommittee, as well as a representative from the Department of Justice.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held on January 14-15, 2008, in Pasadena, California.

Respectfully submitted,

Peter G. McCabe,
Secretary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

September 26, 2007

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman and Senator Specter:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must be approved by an Act of Congress, 28 U.S.C. § 2074(b).

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee

Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and

- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Advisory Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Advisory Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference. It is enclosed with this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.,* House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work-product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work-product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver.* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

• *Protections Against Inadvertent Disclosure.* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

• *Effect on State Proceedings and Disclosures Made in State Courts.* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

• *Orders Protecting Privileged Communications Binding on Non-Parties.* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

• *Agreements Protecting Privileged Communications Binding on Parties.* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of

privilege waiver, even for disclosures that are made initially in state proceedings — and even when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal-to-state" problem).

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

- In the Advisory Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

The Judicial Conference has no position on the merits of separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502 — against mistaken disclosure and subject matter waiver — would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work-product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed.

The draft language for a selective waiver provision is available on request.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal
Chair, Committee on Rules
of Practice and Procedure

Enclosure

cc: Members, Senate Committee on the Judiciary

PROPOSED NEW EVIDENCE RULE 502

COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF UNITED STATES
(September 2007)

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. — When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

*New material is underlined.

(3) they ought in fairness to be considered together.

(b) **Inadvertent disclosure.** — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) **Disclosure made in a state proceeding.** — When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **Controlling effect of a court order.** — A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling effect of a party agreement**. — An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling effect of this rule.** — Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the

rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. — In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Explanatory Note on Evidence Rule 502
Prepared by the Judicial Conference
Advisory Committee on Evidence Rules

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir.

1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective,

misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver.

The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a

subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the

utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 18, 2007

Honorable Nancy Pelosi
Speaker
United States House of Representatives
H-232 United States Capitol Building
Washington, DC 20515

Dear Madam Speaker:

On behalf of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I am pleased to transmit to you the *Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges.*

The report is submitted to your committee consistent with § 214 of the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248). The legislation directed the rules committee to study the desirability of amending the Federal Rules of Evidence to "provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime" against a child. After extensive consideration and deliberation, the rules committee concluded that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The enclosed report contains the rules committee's findings and recommendations.

Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Steny H. Hoyer
Honorable John A. Boehner
Honorable John Conyers, Jr.
Honorable Lamar Smith

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 2007

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

June 15, 2007

Introduction

Public Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--
>
> (1) a child of either spouse; or
>
> (2) a child under the custody or control of either spouse.
>
> * * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure ("the Rules Committee") is in response to the Section 214 directive. The Advisory Committee on Evidence Rules ("the Advisory Committee") has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the "harm to child" exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against a harm to child exception; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee's work on this subject and agrees with the Advisory Committee's conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. *See Trammel v. United States,* 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. *See United States v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. *See* Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether the Evidence Rules should be amended to codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege

There is only one reported case in which a Federal court has upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005), the accused was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting a witness from being compelled to testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

> The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception—not currently recognized by any federal court—allowing a court to compel adverse spousal testimony.

409 F.3d at 1231.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe,* 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The *Jarvison* court made no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial privilege – the precise privilege involved in *Jarvison.* In *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no warning was required because the defendant was charged with harm to a child of the marriage, and therefore the spouse had no adverse testimonial privilege to assert. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See, e.g., United States v. Clark,* 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

Cases Recognizing Harm to Child Exception

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse testimonial privilege and the confidential communications privilege.

Marital Communications Privilege

In *United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply to the defendant's communication. The court stated:

> The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See Untied States v. Roberson,* 859 F.2d 1376, 1370 (9th Cir. 1988). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138.

In *Bahe, supra,* the court relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

> Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez,* 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

> Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. *See also* 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.
>
> The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. * * *
>
> The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

Adverse Testimonial Privilege

In *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

> We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well.
>
> Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 Geo. L. J. 257, 258 (1974).

526 F.2d at 1366.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison*, is dubious on a number of grounds:

1. Its analysis is perfunctory.

2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).

3. It is contrary to a prior case in its own circuit that applied the harm to child exception to the adverse testimonial privilege.

4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery.*

5. Its assertion that no federal court had ever compelled a witness to testify against a spouse is incorrect.

II. The "Necessity and Desirability" of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.

A. General Criteria for Proposing an Amendment to the Evidence Rules

The Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment's notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria is found:

1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;

2) the existing rule is simply unworkable for courts and litigants; or

3) the rule is subject to an unconstitutional application.

B. Application of Amendment Criteria to Proposed Harm to Child Exception

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application, because the privilege would apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But the split in the courts over the harm to child exception, discussed above, is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split on the question, and ten circuits had written decisions on the subject; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the admissibility of compromise evidence in criminal prosecutions was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question. Again, the disputed question was one that arose frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises only rarely in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications.* All of the reported federal court cases have agreed with and applied this exception. So there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

As to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privileges does not rise to the level of necessity that traditionally has justified an amendment to the Evidence Rules.

C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, foster-children, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term "custody or control" may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant's custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature. But even if that distinction has merit, the dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, and none of these decisions provide analysis of the scope of such an exception. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. Codifying the harm to child exception runs the risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of the accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm to child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm to child exception to the

adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to codify such an exception would create an anomaly: that very specific, and rarely applicable, exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.[1]

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there

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[1] The situation can be usefully contrasted with the proposed Rule 502 that has been approved by the Advisory Committee and is currently being considered by the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of pre-production privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute both on when waiver is to be found and on the scope of waiver.

are policy arguments supporting such an exception, and is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term "minor" in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.,* Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.,* Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, harm to children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster-children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster-child); *Stevens v. State,* 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State,* 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in "custody or control" covered children spending the night with defendant's daughters); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether "custody or control" might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. *See*, e.g., Colo. Rev. Stat. § 13-90-107 (exception to adverse testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis. Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which "one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either"). *See also United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence,* 28 Hous. L.Rev. 1095 (1991).

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.

II.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Introductory Memorandum on the Project to Restyle the Evidence Rules
Date: October 15, 2007

The Evidence Rules Committee has voted to undertake a project to restyle the Evidence Rules. The project has been approved by the Standing Committee and was given the go-ahead by Chief Justice Roberts.

This memorandum provides an introduction to the restyling project. It is divided into three parts. Part One provides a brief statement of the goal of the restyling project, and sets forth the protocol and timeline for restyling. Part Two raises some basic issues for the Committee to consider as it embarks on the restyling project. Part Three sets forth a number of Evidence Rules that have been restyled by Professor Kimble (the style consultant to the Standing Committee), and revised after comments by the Reporter. The purpose of this initial restyling is to give the Committee some indication of what restyled rules will look like. No vote is to be taken on these restyled rules at this point.

I. Introduction to the Project

The Appellate, Criminal and Civil Rules have already been restyled. The description of the Civil Rules restyling project (the latest to be completed) provides a useful introduction to the project to restyle the Evidence Rules. The description was submitted by the Standing Committee to the Judicial Conference to explain the project. It provides as follows:

> The Advisory Committee on Civil Rules completed a comprehensive "style" revision of the Civil Rules and the Forms. The revisions are the third set in the project to make "style" revisions to the Federal Rules of Appellate, Criminal, and Civil Procedure to clarify and simplify them without changing their substantive meaning.

The advisory committee submitted four separate sets of proposed amendments to the Civil Rules and Illustrative Forms related to the style project. The first set is the proposed style only amendments to Rules 1 to 86. The second set is a small number of proposals for minor technical amendments that were noncontroversial, made clear improvements, but arguably changed substantive meaning. These "style/substance" changes were approved separately from the restyled rules, to become effective at the same time. The third set is proposed style changes to the Civil Rules amendments due to take effect on December 1, 2006 – new Rule 5.1, amended Rule 50, and the amended rules involving electronic discovery – to make them consistent with the comprehensive style revisions. Finally, the advisory committee proposed a comprehensive revision of the Illustrative Forms consistent with the style conventions followed in the amended rules.

The Process Used in the Style Project

The work to make the Criminal, Appellate, and Civil Rules clearer, simpler, and easier to understand began in 1992. A nationally recognized legal-writing scholar [Brian Garner] prepared drafting guidelines to serve as a common set of style preferences and conventions and prepared a first draft of the restyled Civil Rules using those guidelines. The then-chair of the advisory committee refined the draft. The work on the Civil Rules was deferred while the Criminal Rules, then the Appellate Rules, were successfully revised using the uniform drafting guidelines. The improvement in the rules resulting from the style revisions led the advisory committee to return to the work on the Civil Rules.

The advisory committee and the Committee set up a procedure that required repeated and numerous levels of review to ensure that the style revisions were as clear as possible without changing substantive meaning. The Committee appointed a style subcommittee to work with a prominent legal-writing scholar [Professor Joe Kimble] and a consultant [Joe Spaniol] to review the style revisions. The style subcommittee members analyzed the implications of every proposed change. Three law professors recognized as leading experts in civil procedure – including the advisory committee's reporter, Professor Edward Cooper – reviewed, researched, and revised, providing a reliable basis for the many drafting decisions the project required. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees to subject the proposed style revisions to further study before they were presented to the full advisory committee for review. This process occurred before the proposed style amendments were published for comment and was repeated to revise and refine the proposals in light of the comments received. The process took two and half years and produced more than 750 documents.

The proposed style rule amendments and the minor, technical "style/substance" amendments were published in February 2005 for approximately ten months for public comment; the proposed style amendments to the forms were published in August 2005 for approximately six months. In addition, copies of the proposed revisions were sent to all

major bar groups, including liaisons from each state bar association. Major bar organizations, including the American College of Trial Lawyers and the American Bar Association provided substantial input, both before and after the proposals were formally published. Approximately 25 comments were submitted in the public comment period on the proposed Civil Rules style revisions. Two public hearings were cancelled because no one asked to testify. A third scheduled public hearing on the proposed rules amendments was held at which two witnesses spoke on behalf of a group of practitioners and academics who had reviewed the entire set of revised Civil Rules.

Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions. Some members of two groups that studied the proposed amendments raised concerns that the changes might create inadvertent substantive changes and would generate satellite litigation. The advisory committee did not view this as a significant problem in light of the extensive work to identify and avoid substantive changes, the fact that the meaning of the rules is inevitably dynamic, and the likelihood that the improvement in simplification and clarity would reduce rather than foment "satellite litigation." Two individuals expressed a concern that the style amendments might supersede any conflicting statutory provisions in effect when the amendments became effective. The advisory committee studied this issue carefully, noting that this had not been a problem when the Criminal and Appellate Rules were "restyled," concluded that the supersession concern did not raise a significant problem for the Civil Rules style amendments, and recommended a revision to Rule 86 to make the absence of any supersession effect clear.

The Drafting Approaches Used in the Style Project

The style project is intended to clarify, simplify, and modernize expression, without changing the substantive meaning of the Civil Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation; reduced the use of inconsistent and ambiguous words; minimized the use of redundant words and terms; and removed words and terms that were outdated.

Formatting changes made the dense, block paragraphs and lengthy sentences of the current rules much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. These changes make the structure of the rules graphic and make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. The seventy years of adding new rules and amending rules led to inconsistent words and terms. For example, the present rules use "for cause shown," "upon cause shown," "for good cause," and "for good cause shown"; the rules also use "costs, including reasonable

attorney's fees"; "reasonable costs and attorney's fees"; "reasonable expenses, including attorney's fees"; and "reasonable expenses, including a reasonable attorney's fee." Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistency by using the same words to express the same meaning. For example, consistent expression-was achieved by changing "infant" in many rules to "minor" in all the rules; from "upon motion or on its own initiative" and variations to "on motion or on its own"; and from "deemed" in some rules and "considered" in other rules to "considered" in all rules. Some variations in expression were carried forward when the context made it appropriate to do so. For example, the words "stipulate," "agree," and "consent" appear in different rules, and "written" qualifies these words in some rules but not others. The advisory committee reduced the number of variations but at times the former words were carried forward to avoid changing substantive meaning. A chart containing the advisory committee's resolution of inconsistent phrases that recur throughout the rules is attached to the text of the proposed restyled rules.

The restyled rules also minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or "should," depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The rules have numerous "intensifiers," expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some of the current rules use the words "the court may, in its discretion." " May" means "has the discretion to"; in its discretion is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

Outdated and archaic terms and concepts were removed. For example, the reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. The references to "demurrers, pleas, and exceptions" in Rule 7(c) and to "mesne process" in Rule 77(c) are clearly outdated and have been removed from the style rules.

A number of redundant cross-references were also removed. For example, several rules include a cross-reference to Rule 11, which is unnecessary because Rule 11 applies by its own terms to "every pleading, written motion, and other paper."

The advisory committee declined to make more sweeping changes to the rules that might have resulted in improvements but would have burdened the bar and bench. The advisory committee did not change any rule numbers, even though some of the rules might benefit from repositioning. Although some subdivisions have been rearranged within some rules to achieve greater clarity and simplicity, the advisory committee took care that

commonly used and cited subdivisions retain their current designations. The restyled rules include a comparison chart to make it easy to identify redesignated subdivisions. Words and terms that have acquired special status from years of interpretation were retained. For example, there is no revision of the term "failure to state a claim upon which relief can be granted."

The above description of the restyling project for the Civil Rules can serve as a template for the Evidence project, with perhaps one exception: the Civil Rules Committee divided into subcommittees, with each subcommittee allocated a certain set of rules. A good argument can be made that subcommittees are unnecessary for the Evidence project, for at least two reasons: 1) The Evidence Rules Committee is much smaller than the Civil Rules Committee, and a subcommittee of two or three members might not be optimal; and 2) the Evidence Rules are a much smaller set than the Civil Rules. At the November meeting, Committee members may wish to discuss the pros and cons of proceeding by way of subcommittees.

Ground Rules for Restyling:

In an email to the Reporter, Professor Kimble set forth some proposed ground rules for restyling. Most of these principles were derived from the Civil Rules project. They are as follows:

(1) We'll follow Garner's Guidelines. [A copy of Garner's style guidelines has been distributed to each committee member.]

(2) On matters not covered by the Guidelines, we'll follow Garner's reference books. [The reporter will keep those books on file.]

(3) Style controls on matters of style. [Meaning that a final decision on the *best* style is left to the Standing Committee's Subcommittee on Style. In contrast, the Evidence Rules Committee has the last word on whether a purported style change actually changes the substance of the rule.]

(4) We are prepared to reorganize subdivisions--not willy-nilly, but for good reason. [Professor Kimble considers this critical to the project's success. Examples of renumbered and reconfigured subdivisions are included later in this memo. **Note that restyling will *not* result in any renumbering of entire rules, i.e., 403 will not become 402, etc**.].

Steps in Restyling:

Following the practice of previous projects, restyling will proceed in the following steps:

1. Professor Kimble prepares a draft of a restyled rule.

2. The Reporter reviews the draft and provides suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural. But the suggestions can go further than just the substantive/procedural distinction. For example, Professor Kimble's draft of Rule 104 combined subdivisions (a) and (b). This was not a substantive change. But the Reporter pointed out that lawyers and judges are accustomed to referring to the "104(a) standard" and the "104(b) standard"; that having the standards in separate subdivisions provided a useful contrast; and that the Supreme Court had distinguished the 104(a) and 104(b) standards in several decisions, including *Daubert* and *Huddleston.* While the change would not be a change of a substantive legal standard, it would be much more disruptive than a basic style change and so it is "substantive" in a broader sense. (More on the definition of "substantive" in Part Two of this memorandum).

3. Professor Kimble considers the Reporter's comments and revises the draft if he finds it necessary. For example, Professor Kimble deleted the proposed combination of Rule 104(a) and (b) after receiving the Reporter's comments.

4. This second draft of the rule is sent to the Standing Committee's Subcommittee on Style. The Subcommittee reviews the entire draft, with a focus on the areas of disagreement between Professor Kimble and the Reporter. In previous projects, many disputes about the propriety of a proposed change were resolved at this step. On occasion, however, the Subcommittee on Style found it appropriate to refer the matter to the Advisory Committee.

5. The Style Subcommittee draft (which at this point could be the third draft of the rule), is referred to the Evidence Rules Committee. The draft will contain footnotes of the issues unresolved up to this point in the process. Committee members review the draft and give their views on whether a proposed change is "substantive." At this stage, the Committee will also receive the views of one or more consultants designated by the ABA, as well as the views of its own consultant Professor Broun and the liaisons from other Committees. If a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved.

6. The draft of the full Committee is reviewed by the Standing Committee and, if approved, released for public comment. The Civil Rules Committee sought Standing Committee approval in three separate packages, and waited until all the rules were prepared and approved before submitting the whole for public comment.

Proposed Timeline for the Restyling Project

John Rabiej has prepared the following rough timeline for the restyling project:

December / January 2008 – Professors Capra and Kimble draft and comment on Group A Rules

February 2008 – Standing Style Subcommittee reviews **Group A — Rules 101-415.**

April 2008 – Advisory Committee reviews Group A

June 2008 – Standing Committee reviews Group A for publication for comment (but the package is held until the whole is completed).

June 2008 – Professor Kimble completes restyling **Group B — Rules 501-706.**

July 2008 – Professor Capra edits Group B

August 2008 – Standing Style Subcommittee reviews Group B

October 2008 – Advisory Committee reviews Group B

December 2008 – Professor Kimble completes editing **Group C — Rules 801-1103**

January 2009 – Standing Committee reviews Group B for publication (but the package is held until the whole is completed).

January 2009 – Professor Capra edits Group C

February 2009 – Standing Style Subcommittee reviews Group C

April 2009 – Advisory Committee reviews Group C

June 2009 – Standing Committee reviews Group C for publication

August 2009 – Publication of entire set of restyled rules

January 2010 – Hearings

April 2010 – Advisory Committee approves restyled rules

June 2010 – Standing Committee approves rules

September 2010 – Judicial Conference approves rules

April 2011 – Supreme Court approves rules

December 1, 2011 – Rules take effect

II. Basic Issues for the Restyling Project

What follows are some basic questions that the Committee may wish to discuss at this early point in the restyling project.

What Constitutes a "Substantive" Change?

The lesson from the *Erie* doctrine is that the line between "substantive" and "procedural" is difficult to draw, and that the term "substantive" is essentially a conclusion. The working principles used to reach the conclusion are therefore critical. So it is obviously important to have a working definition of "substantive" when embarking on a restyling project.

Based on the experience of the prior restyling projects, a possible working definition of "substantive" as applied to the Evidence Rules may be proposed:

A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement." Examples in the Evidence Rules might include "unfair prejudice" and "truth of the matter asserted."

With respect to the first factor — a change of result in any circuit is substantive — three examples might be useful.

Example One: Rule 404(a) provides that an accused may introduce a "pertinent" character trait. That is the only place in the Evidence Rules in which the word "pertinent" is used. One of the goals of the restyling project is to use consistent terminology throughout the Rules. Professor Kimble raised the question of whether "pertinent" could be changed to "relevant." But investigation showed that such a change would be "substantive" because the Second Circuit reads the word "pertinent" differently from "relevant." *See United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000) ("Federal R. Evid. 404(a)(1) applies a lower threshold of relevancy to character evidence than that applicable to other evidence."). Accordingly the change would be substantive.

Example Two: The exception for past recollection recorded allows admission of a "memorandum or record" if certain admissibility requirements have been met. One of the reasons for restyling the Evidence Rules is to modernize this type of language to accommodate the use of electronic evidence. If Rule 803(5) is amended to cover a "memorandum or record, in any form", is that a substantive change? The answer would be no, because no court has excluded a record under Rule 803(5) on the ground that it is electronic. So the change would not change the result on admissibility in any circuit.

Example Three: Rule 1101 provides that the Evidence Rules are applicable to " . . . the United States Claims Court . . ." The name of that court has been changed to the "United States Court of Federal Claims." Implementing that name change in the rule would clearly be one of style and not substance.

Substantive Issues That Arise During Restyling

Both the Civil and Criminal Rules Committees reported that restyling often uncovered substantive problems with a rule that justified an amendment. Some of these problems were minor and uncontroversial, others were more substantial. The Evidence Rules Committee may wish to consider how it wishes to proceed when such substantive issues are raised. The Civil Rules Committee proposed amendments on two tracks: Track A involved pure style changes and Track B involved minor noncontroversial substantive changes. Controversial substantive changes were reserved for later consideration. The Committee may wish to discuss how to deal with substantive changes while proceeding through restyling.

A New Rule for Definitions?

Would it be useful, in the course of restyling, to compile a new rule for definitions? The Criminal Rules Committee added a rule on definitions. See Fed.R.Crim.P. 1(b), providing definitions for "Attorney for the government", "Court", "Federal Judge", "Judge", Magistrate Judge", "Oath", "Organization", "Petty Offense", "State", and "State or Local Judicial Officer". The Civil Rules Committee did not add a definitions section as part of its style project.

A good argument can be made that a definitions section in the Evidence Rules would be unnecessary and possibly counterproductive. Most importantly, some of the Evidence Rules already provide a definition for some terms — most importantly Rule 801, which defines hearsay, and Rule 1001, which defines writings and recordings, original, duplicate, etc. Adding a definition section would undoubtedly require transferring those definitions to that new section — it would be odd, to say the least, to have a rule covering "definitions" that in fact does not cover all the definitions used in the rules. But transferring, for example, the definition of hearsay to a more generic rule on definitions would surely be disruptive — and it would not be user-friendly, which is the basic reason for restyling.

Another obvious problem for a definitions section is the difficulty in determining which terms must be defined. Moreover, an attempt to define one of the important terms used in the Evidence Rules might result in a substantive change, as courts might not be in uniform agreement about the meaning of the term. It can be argued that the restyling project raises enough difficult questions without having to address those raised by a definitions section.

III. Examples of Restyled Rules

What follows are the second drafts of Rules 101-302, which were prepared for this meeting, and Rules 404 and 612, which were previously submitted to the Committee as examples of how restyled rules might work. The drafts come in two forms. First is a blacklined version, together with Reporter's comments on outstanding issues and concerns. Second is a "side-by side" version, showing the original rule and its restyled counterpart.

Rules 101-302 have already gone through the first level of review, as they have been reviewed by the Reporter and Professor Kimble has redrafted them in response to the Reporter's comments. But the drafts have not yet been submitted to the Style Subcommittee of the Standing Committee.

The Committee will not be voting on these drafts at the November 2007 meeting. It would be quite useful, however, for members to raise any questions or concerns they may have about any of the drafts at the meeting.

Rule 101 (Blacklined version).

Rule 101. Scope

~~These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.~~

Rule 101 — Scope

These rules apply to:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

The specific proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

Reporter's Comment:

The difficult questions of exceptions to coverage of the Evidence Rules is probably best left to the end of the process, i.e., Rule 1101. There are a number of exceptions in the case law that are not in the Rule, and this raises difficult questions of possible substantive changes. Also, the litany of statutes in Rule 1101 presents a thorny issue. All told, there is good reason for leaving these matters until the Committee gets into a styling rhythm. That is why Rule 101 is left simple and spare.

Rule 101, side-by-side

ARTICLE I. GENERAL PROVISIONS **Rule 101. Scope**	ARTICLE I. GENERAL PROVISIONS **Rule 101 – Scope**
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	These rules apply to: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands. The specific proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

Rule 102 Blacklined Version

Rule 102. Purpose ~~and Construction~~

These rules ~~shall~~ should be construed so as to administer every proceeding fairly, ~~to secure fairness in administration, elimination of~~ eliminate unjustifiable expense and delay, ~~and~~ promote the ~~promotion of~~ growth and development ~~of the law of evidence to the end that the truth may be ascertained and proceedings justly determined~~ of evidence law, [and] achieve a just result [and determine the truth], .

Reporter's Comment:

I would retain the references to both 1) promotion of growth and development of the law of evidence and 2) the ascertainment of truth. Both these factors have been relied on by a number of courts to construe the evidence rules. See, e.g., Costantino v. Herzog, 203 F.3d 164 (2d Cir. 2000), where the court construed the learned treatise exception to cover a video even though the exception is literally written to cover only hardcopy published material. The court found its construction to be consistent with the growth and development of the law and the ascertainment of truth.

Rule 102, side-by-side

Rule 102. Purpose and Construction	**Rule 102 – Purpose**
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, promote the development of evidence law, achieve a just result [, and determine the truth?].

Rule 103 Restyling, Blacklined version

Rule 103. Rulings on Evidence

(a) ~~Effect of erroneous ruling.~~ Preserving a Claim of Error. ~~Error may not be predicated upon a ruling which admits or excludes~~ A party may claim error in a ruling to admit or exclude evidence only if the error affects the party's ~~unless a~~ substantial right ~~of the party is affected,~~ and:

~~(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or~~

(1) if the ruling admits evidence, the party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

~~(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.~~

(2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court ~~makes a definitive ruling~~ rules definitively on the record ~~admitting or excluding evidence,~~ either ~~at or~~ before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

~~(b)~~ **(c)** ~~Record of offer and ruling.~~ **Court's Statements About the Ruling; Directing an Offer of Proof.** The court may ~~add any other or further statement which shows~~ make any statement about the character or form of the evidence, ~~the form in which it was offered,~~ the objection made, and the ruling ~~thereon~~. The court ~~It~~ may also direct that an offer of proof be made ~~the making of an offer~~ in question-and-answer form.

~~(c)~~ **(d)** ~~Hearing of jury.~~ **Preventing the Jury from Hearing Inadmissible Evidence.** ~~In jury cases,~~ To the extent practicable, the court must conduct proceedings in a jury trial ~~shall be conducted, to the extent practicable, so as to prevent~~ so that inadmissible evidence ~~from being~~ is not suggested to the jury by any means~~, such as making statements or offers of proof or asking questions in the hearing of the jury~~ [, including statements, offers of proof, questions, or arguments].

~~(d)~~ **(e)** ~~Plain error.~~ **Taking Notice of Plain Error.** ~~Nothing in this rule precludes taking~~ An appellate court may take notice of a plain errors affecting a substantial rights, even if the claim of error was not properly preserved ~~although they were not brought to the attention of the court~~.

Reporter Comments:

1. This is a substantial improvement (especially the subdivision on plain error).

2. This is an example of a restyling that results in reconfigured subdivisions. Professor Kimble is strongly of the opinion that this can be done if necessary. In the case of Rule 103, the alternative is to place the 2000 amendment at the end of the rule, so as not to upset the existing subdivisions. That solution is not ideal, either – if it were we would have done it in 2000. The problem with renumbering is that it disrupts computer searches, sheperdizing, etc. But previous projects found that in certain limited circumstances, the benefits outweighed the costs.

3.. On what is now subdivision (d), the bracketed language— "[including statements, offers of proof, questions, or arguments]" — seems useful as providing some illustrations of what is otherwise a very general statement.

Rule 103, side-by-side

Rule 103. Rulings on Evidence	Rule 103 – Rulings on Evidence
(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects the party's substantial right and: **(1)** if the ruling admits evidence, the party, on the record: **(A)** timely objects or moves to strike; and **(B)** states the specific ground, unless it was apparent from the context; or **(2)** if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions. **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	**(c) Court's Statements About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may also direct that an offer of proof be made in question-and-answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	**(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct the proceedings in a jury trial so that inadmissible evidence is not suggested to the jury by any means [, including statements, offers of proof, questions, or arguments? I'd omit].
(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	**(e) Taking Notice of Plain Error.** An appellate court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104 Restylized (Blacklined Version)

Rule 104. Preliminary Questions

(a) ~~Questions of admissibility generally.~~ **In General.** The court must decide any ~~P~~preliminary questions about whether a witness is qualified, a privilege exists, or evidence is admissible ~~concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)~~. In so deciding ~~making its determination it~~ the court is not bound by the ~~rules of~~ evidence rules, except ~~those with respect to~~ the rules on privileges.

(b) Relevancy ~~conditioned on fact.~~ **That Depends on a Fact.** When the relevancy of evidence depends upon ~~the fulfillment of a~~ fulfilling a factual condition ~~of fact~~, the court ~~shall~~ must admit it ~~upon~~ on, or subject to, the introduction of enough evidence ~~sufficient~~ to support a finding ~~of the fulfillment of~~ that the condition is fulfilled.

(c) ~~Hearing of jury.~~ **Matters That the Jury Must Not Hear.** ~~Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.~~ A hearing on a preliminary question must be conducted outside the jury's hearing if:

(1) the hearing involves the admissibility of a confession;

(2) a criminal defendant is a witness and requests that the jury not be present; or

(3) justice so requires.

(d) Testimony by ~~accused.~~ **a Criminal Defendant.** ~~The accused does not, by~~ By testifying ~~upon~~ on a preliminary ~~matter~~ question, a criminal defendant does not become subject to cross-examination ~~as to~~ on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit ~~the~~ a party's right ~~of a party~~ to introduce [before the jury] evidence relevant to the weight or credibility of other [admitted] evidence.

Reporter's Comments

1. The change from "accused" to "criminal defendant" is one that should be discussed, as it will arise frequently throughout the rules. I don't have an opinion on which is better.

2. In subdivision (e), Joe brackets "before the jury" and "admitted." I would lift both brackets. "Before the jury" is in the existing rule and it is necessary, or at least helpful to distinguish admissibility questions that are for the court and weight questions that are before the jury. The term "admitted" makes a similar emphasis. I think both are helpful.

Rule 104, side-by-side

Rule 104. Preliminary Questions	Rule 104 – Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by the evidence rules, except the rules on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	**(b) Relevancy That Depends on a Fact.** When the relevancy of evidence depends on fulfilling a factual condition, the court must admit it on, or subject to, the introduction of enough evidence to support a finding that the condition is fulfilled.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests. (2(2) not b	**(c) Matters That the Jury Must Not Hear.** A hearing on a preliminary question must be conducted outside the jury's hearing if: **(1)** the hearing involves the admissibility of a confession; **(2)** a criminal defendant is a witness and requests that the jury not be present; or **(3)** justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	**(d) Testimony by a Criminal Defendant.** By testifying on a preliminary question, a criminal defendant does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce [before the jury] evidence that is relevant to the weight or credibility of other [admitted] evidence.

Rule 105 Restyling (Blacklined Version)

Rule 105. ~~Limited Admissibility~~ Limiting Evidence That Applies Only to One Party or for One Purpose.

~~When~~ If the court admits evidence ~~which~~ that is admissible ~~as to~~ against one party or for one purpose ~~but not admissible as to another party or for another purpose is admitted,~~ – but not against another party or for another purpose – the court, ~~upon~~ on request, ~~shall~~ must restrict the evidence to its proper scope and instruct the jury accordingly.

Reporter's Comment:

The term "against *one* party or for *one* purpose" may not cover all the situations in which the rule is supposed to apply. For example, in a case involving three parties, a piece of evidence may be admissible against two parties and inadmissible against the third. Likewise as to purpose — a piece of evidence may be admissible for two purposes but not for a third. The restylized version may need to be changed to take account of these possibilities. One possibility is to say that when evidence is admissible "against a party or for a particular purpose".

Rule 105, side-by-side

Rule 105. Limited Admissibility	**Rule 105 – Limiting Evidence That Is Not Admissible Against All Parties or for All Purposes**
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against one party or for one purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106 Restyling (Blacklined Version)

Rule 106. ~~Remainder~~ Rest of or Related Writings or Recorded Statements.

~~When~~ If a party introduces all or part of a writing or recorded statement ~~or part thereof is introduced by a party~~, an adverse party ~~may require the introduction~~ must be allowed to introduce, at that time, ~~of~~ any other part of it — or any other writing or recorded statement ~~which ought~~ — that should in fairness to be considered ~~contemporaneously with it~~ at the same time .

Reporter Comments:

1. It seems a little awkward to say that the party is allowed to introduce the completing portion "at that time" when it should in fairness be considered "at the same time." Does that need improvement?

2. We need to make a mental note that the "ought in fairness" language has been changed — we lifted that language and put it in Rule 502, so we will need to change it there in the same way.

Rule 106, side-by-side

Rule 106. Remainder of or Related Writings or Recorded Statements	**Rule 106 – Rest of or Related Writings or Recorded Statements**
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party must be allowed to introduce, at that time, any other part of it — or any other writing or recorded statement — that should in fairness be considered at the same time.

Rule 201 Restyled (Blacklined Version)

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. ~~of rule.~~ This rule governs only judicial notice of an adjudicative facts [not a legislative fact].

(b) Kinds of ~~facts~~ Facts That May Be Judicially Noticed. ~~A~~ The court may judicially noticed a fact ~~must be one~~ that is not subject to reasonable dispute ~~in that~~ because it is: ~~either~~

(1) generally known within the [trial court's] territorial jurisdiction ~~of the trial court~~; or

(2) capable of being accurately and ~~ready determination by resort to~~ readily determined from sources whose accuracy cannot reasonably be questioned.

~~(c) When discretionary. A court may take judicial notice, whether requested or not.~~

~~(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.~~

(c) Taking Notice. At any stage of the proceeding, the court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and supplies the court with the necessary information.

~~(e)~~ **(d) Opportunity to Be Heard.** ~~be heard.~~ ~~A~~ On timely request, a party is entitled ~~upon timely request to an opportunity to be heard as to~~ to a hearing on the propriety of taking judicial notice and the tenor of the ~~matter~~ noticed fact. ~~In the absence of prior notification, the request may be made after judicial notice has been taken.~~ If the court takes judicial notice before notifying a party, the party, on request, is still entitled to a hearing.

~~(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.~~

~~(g)~~ **(e) Instructing the Jury.** ~~jury.~~ In a civil ~~action or proceeding~~ case, the court ~~shall~~ must instruct the jury to accept the noticed fact as conclusive ~~any fact judicially noticed~~ [true?]. In a criminal case, the court ~~shall~~ must instruct the jury that it may ~~, but is not required to,~~ or may not accept the noticed fact as conclusive ~~any fact judicially noticed~~ [true?].

Reporter Comments:

1. The bracketed language in subdivision (a) is probably helpful to delineate that the rule distinguishes between adjudicative and legislative facts. It could be especially helpful to put evidence novices on notice of that distinction.

2. In (b)(1), Joe brackets the term "trial court." I would lift those brackets. The rule currently specifies that it applies to trial courts, and any perceived change raises the question of the use of judicial notice on appeal, and that is a complicated question with a lot of case law. See Federal Rules of Evidence Manual at 201-11, 12. So deleting the reference to the trial court is probably substantive.

3. Joe asks whether the word "timely" before "request" is necessary in describing the party's right to be heard. I will need to do research on that one to see if it has been applied in the cases. As it is currently in the rule, the protocol should probably be that it stays there unless it can be determined that deleting it will not change the result in a reported case.

4. Judge Hinkle has the following comment about subdivision (d), on the opportunity to be heard:

> In Rule 201, the right to be heard is sometimes different from a hearing. We often "hear" from parties through memoranda. In ruling on a motion for new trial, for example, I might notice a fact after giving a party a right to address the issue in writing. And appellate courts almost never have "hearings." I'm not sure this matters --- these are primarily trial rules, after all, and I'm not sure how or whether they apply in the context I've posited --- but I thought it worth noting for whatever consideration you want to give it at this stage.

On the basis of this comment, the Committee may wish to consider whether to retain the language in the existing rule — opportunity to be heard — rather than the word "hearing" that was substituted by Joe. That change is substantive if one could read it as requiring an actual hearing in all circumstances, as that is certainly not the case under the existing practice.

5. In subdivision (e) on instructing the jury, Joe floats the possibility of substituting the word "true" for the word "conclusive." But there is a difference between a fact that is true and one that is conclusive, at least in the context of instructing the jury. The term "conclusive" ties into the related case law on presumptions, and is used in the case law to evaluate the validity of instructions in criminal cases. So the word "conclusive" should probably be retained.

Rule 201 side-by-side

ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**	ARTICLE II. JUDICIAL NOTICE **Rule 201 – Judicial Notice of Adjudicative Facts**
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs only judicial notice of an adjudicative fact [, not a legislative fact]
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it is: **(1)** generally known within the [trial?] court's territorial jurisdiction; or **(2)** capable of being accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and supplies the court with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely [not used elsewhere] request, a party is entitled to a hearing on the propriety of taking judicial notice and the tenor of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to a hearing.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive [true?]. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive [true?].

Rule 301 Restylized (Blacklined Version)

Rule 301. Presumptions in ~~General in Civil Actions and Proceedings~~ a Civil Case Generally

In ~~all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed~~ a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut [or meet] the presumption.~~, but~~ But this rule does not shift ~~to such party~~ the burden of proof in the sense of the risk of non-persuasion; ~~which~~ the burden of proof remains ~~throughout the trial upon~~ on the party ~~on whom it was originally cast~~ who has it originally.

Reporter Comment:

1. This is a good improvement.

2. Joe asks whether the words "or meet" are necessary. Do they add anything to "rebut"?

I will need to research this. For now the language should be retained, under the principle that deletions should occur only if it is clear that they are not substantive.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301 – Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut [or meet?] the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who has it originally.

Rule 302 Restyling (Blacklined Version)

Rule 302. ~~Applicability of State Law in Civil Actions and Proceedings~~ Effect of State Law on Presumptions in a Civil Case.

Alternative 1

In ~~civil actions and proceedings~~ a civil case, state law governs the effect of a presumption ~~respecting~~ about a fact ~~which is~~ if the fact proves [goes to prove?] an element of a claim or defense ~~as to~~ for which state law supplies the rule of decision ~~is determined in accordance with state law.~~

Alternative 2

In ~~civil actions and proceedings~~ a civil case, state law governs the effect of a presumption ~~respecting about a fact which is an element of~~ related to a claim or defense ~~as to~~ for which state law supplies the rule of decision ~~is determined in accordance with state law.~~

Reporter's Comment

1. Joe asks: "does the for which clause modify element or claim or defense?" The answer is yes. State law governs the effect of a presumption as to an element governed by state law.

2. The second alternative is cleaner and it eliminates the possibly awkward language about a "fact" constituting an "element." There doesn't seem to be a reason to try to distinguish between facts and elements. The point is that state law governs the effect of a presumption that is relevant to a claim or defense.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302 – Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption about a fact if the fact proves [goes to prove?] an element of a claim or defense and state law supplies the rule of decision for the element. (Alternative) In a civil case, state law governs the effect of a presumption related to a claim or defense for which state law supplies the rule of decision.

Rule 404(a) restyling draft

(Note, there is no blacklined version because the rule is so substantially reworked)

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	**Rule 404 — Character Evidence; Evidence of Crimes or Other Acts**
(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:	**(a) Character Evidence.** **(1)** ***In General.*** Evidence of a person's character trait is not admissible to prove that the person acted in accordance with the trait on a particular occasion.
(1) Character of Accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;	**(2)** ***Exceptions.*** The following exceptions apply: **(A)** a criminal defendant may offer evidence of the defendant's pertinent [relevant?] trait, and the prosecutor may offer evidence to rebut it;

(2) Character of Alleged Victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of Witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(B)** a criminal defendant, subject to Rule 412, may offer evidence of an alleged crime victim's pertinent [relevant?] trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor; and **(D)** evidence of a witness's trait may be admitted under Rules 607, 608, and 609.
(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	**(b) Crimes or Other Acts.** **(1)** ***In General.*** Evidence of a crime or other act is not admissible to prove a character trait that led the person to act in accordance with the trait on a particular occasion. **(2)** ***Exceptions; Notice.*** Evidence of a crime or other act is admissible for other purposes, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident. On request by a criminal defendant, the prosecutor must: **(A)** provide reasonable notice of the general nature of that evidence if the prosecutor intends to use it at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Reporter's Comments:

1. Joe's bracketed language that would change "pertinent" to "relevant" is substantive. The Second Circuit has held that these two words have different meanings. See the discussion earlier in this memo.

Rule 612 Restyling Draft

(Note, no blacklined version is provided, given the substantial changes).

Rule 612. Writing Used To Refresh Memory	Rule 612 — Writing Used to Refresh a Witness's Memory.
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— **(1)** while testifying, or **(2)** before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	**(a) General Application.** This rule gives an adverse [opposing?] party certain rights when a witness uses a writing — including an electronic one — to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that the party should have those rights. **(b) Adverse Party's Rights; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, the adverse [opposing?] party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes an unrelated matter, the court must examine it in camera [in chambers?], delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over [either party's?] objection must be preserved for the record. **(c) Failure to Produce or Deliver.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or [may?] declare a mistrial.

Reporter's Comments:

1. Joe brackets "opposing" as an alternative to "adverse". I think "opposing" sounds like a party on the other side of the "v". A party can have an adverse interest even if it is not "opposing" in that sense. The term "adverse" is used elsewhere, e.g., Rule 611(c); and it has

a different meaning in the rules than the term "opponent." For example, Rule 801(d)(2)(A) provides that statements of a party "opponent" are not hearsay. It has been held that the exception does not apply to parties on the same side of the "v" even though they have adverse interests. So the bottom line is, changing the language from"adverse" to "opposing" is a substantive change as the two terms mean different things.

2. Joe suggests "in chambers" rather than "in camera." But "in camera" is a term of art, and as such should probably be retained. "In chambers" is somewhat misleading because it sounds as if the review must actually occur in the judge's chambers, when in fact the point is that the judge conducts the review privately.

3. Joe suggests that the word "may" could be added to the language about the court's course of action if the government does not produce the writing in a criminal case. I think the "may" is confusing. The rule is saying that the court must do something — either strike the testimony or declare a mistrial. Adding the word "may" to this mandate seems confusing. It seems to indicate that the trial court could decide to do nothing.

4. Joe makes a point of deleting references to "the interests of justice." Research is needed to determine whether such a deletion amounts to a substantive change. The "interests of justice" language is often quoted by courts deciding Rule 612 issues; but further inquiry is necessary to determine whether that language actually means something different from the exercise of discretion. Note that the term "interests of justice" is used in other Evidence Rules. See, e.g., Rule 807.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Possible Amendment to Evidence Rule 804(b)(3), to extend the corroborating circumstances requirement to statements offered by the prosecution.
Date: October 15, 2007

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3). In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest. The Evidence Rules Committee previously proposed such an amendment, but eventually it was withdrawn because of perceived problems in the relationship between the amendment and the Confrontation Clause. That withdrawal occurred, however, before the Supreme Court's decisions in *Crawford v. Washington* and especially *Whorton v. Bockting*. One question for the Committee to consider is whether the change in the law of Confrontation has lifted any impediment to an amendment.

This memorandum is in five parts. Part One provides background on the current Rule's one-way application of the corroborating circumstances requirement; it includes a discussion of the legislative history, conflict in the case law, and state law analogues. Part Two provides a description of the Committee's previous attempt to amend the Rule. Part Three discusses other possible problems raised by the Rule and analyzes whether changes to the Rule would be useful to resolve these other problems; this part includes a discussion of any impact of *Crawford* on an attempt to amend Rule 804(b)(3). Part Four sets forth possible drafting alternatives for an amendment and a supporting Committee Note. Part Five sets forth drafting alternatives previously rejected by the Committee.

I. Introduction

A. The One-Way Corroboration Requirement

Rule 804(b)(3) provides that the following is not excluded by the hearsay rule:

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability *and offered to exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution.

A hypothetical illustrates the asymmetry in the text of the current Rule: A bank robber comes home one day and is having a casual, intimate conversation with his girlfriend. She asks him how his day went. He says:

> "Fine. I robbed a bank with Bill. I wanted to get Jimmy to help me because it was a complex job, but I couldn't persuade him to come."

This statement is against the declarant's penal interest under *Williamson v. United States,* 512 U.S. 594 (1994). *Williamson* requires each declaration, including identification of other individuals, to be "truly self-inculpatory." In this example, identification of Bill is disserving to the speaker because it demonstrates inside information and involves the declarant in a conspiracy as well as felony murder. Identification of Jimmy is also inculpatory of the speaker because it is an admission that he tried to enlist another person in the conspiracy. Moreover, the declarant made his statement to a trusted loved one, with no apparent intent to shift blame to others or curry favor with the authorities. Statements such as those in the example are routinely found to be disserving even after *Williamson.* See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made by cohorts to another cohort about a prior crime involving Shukri and identifying Shukri by name were against the declarants' penal interest, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statements at a Hell's Angel's meeting about an arson in which defendant was involved was disserving because it was made to associates and identified the declarant and the defendant as conspirators).

The way the Rule currently reads, the declarant's statement to his girlfriend (assuming he is unavailable) would be admissible against Bill simply because it is against the declarant's penal

interest – no additional admissibility requirement must be met. In contrast, more is required for Jimmy to have the exact same statement admitted in his favor at his trial. Jimmy must show not only that the statement is disserving to the declarant, but also that there are corroborating circumstances clearly indicating the trustworthiness of the statement.

Thus, the text of the Rule is asymmetrical. It imposes an admissibility requirement on the accused that is not imposed on the prosecution for the same category of hearsay statement.

B. Legislative History

The legislative history of the second sentence of Rule804(b)(3) indicates that the merits of a one-way corroborating circumstances requirement were never seriously considered or debated. Professor Tague has done an exhaustive search of the Advisory Committee proceedings, Standing Committee proceedings, and Congressional proceedings on Rule 804(b)(3). See Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Georgetown L.J. 851 (1981). His research indicates the following:

1) The initial Advisory Committee proposal had no corroboration requirement at all. To the contrary, the proposal contained a sentence referred to as "the *Bruton* sentence". This sentence provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused", was not admissible under the exception. (This language was adopted in several state versions of the Rule). Thus, the initial proposal was basically a one-way rule of admissibility *in favor* of criminal defendants.

2) Senator McClellan vigorously opposed the proposed Rule. This opposition threatened to scuttle all of the proposed Evidence Rules, and the Advisory Committee thought that it might even lead to Congressional change of the Rules process itself. Senator McClellan was concerned that defendants would get unsavory characters to claim out of court that they and not the defendant did the crime charged — then these unsavory characters would simply declare the privilege and refuse to testify at the defendant's trial. He suggested a corroboration requirement, so that at least it would appear that the exculpatory declarant might actually have committed the crime. The Advisory Committee saw no problem with a corroboration requirement because Professor Cleary, the Reporter, believed that it was already inherent in the "against penal interest" requirement. Cleary also reasoned that any corroboration requirement would be automatically met by a simple declaration from the defendant that he was innocent. So essentially, the Advisory Committee saw no harm in throwing Senator McClellan a bone. As a result, the Advisory Committee added the following sentence to the proposed Rule:

> "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated."

3) Apparently the Committee saw no need to consider the application of a corroboration

requirement to statements offered by the prosecution, because under its proposal, declarations against penal interest could not even be offered by the prosecution due to the *Bruton* sentence. But Senator McClellan was not satisfied. He demanded that the Committee delete the *Bruton* sentence. He convinced the Committee that the *Bruton* sentence was overbroad "because not every statement made by a declarant implicating the accused is an attempt to curry favor with the authorities." The Committee decided to delete the *Bruton* sentence from the rule and to change the note to state that a court should determine the penal interest effect of an inculpatory statement in each case. But the Committee never addressed or recognized the disparity it then created by imposing a corroboration requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes — first the addition of a corroboration requirement at a time when inculpatory statements were inadmissible under the rule; then a change to the rule to permit some admissibility of inculpatory statements, without thinking about how the two changes would fit together. The Standing Committee approved the Advisory Committee's amendments, again without focusing on the anomaly of a one-way corroboration requirement.

4) Even after all that, the Department of Justice opposed Rule 804(b)(3) as it was sent to the Supreme Court. Apparently DOJ was of the view that the exception could be used only by criminal defendants. DOJ saw a risk of unreliable confederates trying to get their friends acquitted through hearsay. It believed that the simple corroboration requirement set forth in the proposal was not enough protection against unreliable hearsay; DOJ was of the opinion that the corroboration requirement could be met by a defendant's simple protestation of innocence. DOJ complained to the Supreme Court. Chief Justice Burger responded by returning the proposed Rule 804(b)(3) to the Standing Committee for reconsideration. The Standing Committee, upon reconsideration, rejected the arguments of DOJ, specifically stating that the corroboration requirement could not be met by a simple protestation by the defendant that he was innocent, and that trial judges could be trusted to exclude statements of confederates if they were not disserving in context. The Standing Committee made no changes in the proposal and it was sent back to the Supreme Court. The Supreme Court approved the proposal as well, and the proposed Rule 804(b)(3) was then reviewed by the House Subcommittee on Criminal Justice.

5) The House Subcommittee decided to beef up the corroboration requirement--apparently unconvinced that the Advisory Committee version would prevent the accused from corroborating by a simple protestation of his own innocence. The Subcommittee changed the second sentence of the rule to provide that "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The House Subcommittee also decided to put the "*Bruton* sentence" back into the Rule, apparently because the Subcommittee thought it would violate the Confrontation Clause to admit accomplice hearsay against an accused.

6) The Advisory and Standing Committees suggested to the House Subcommittee that the word "clearly" be taken out of the redrafted corroboration requirement. That word would, in the Committees' view, impose "a burden beyond those ordinarily attending the admissibility of evidence, particularly statements offered by defendants in criminal cases." Neither the House

Subcommittee nor the Judiciary Committee responded to this suggestion. The rule as proposed by the House Subcommittee (including the "*Bruton* sentence") passed the House without discussion.

7) The Senate Judiciary Committee accepted the House's version of the rule and the corroboration requirement, but deleted the *Bruton* sentence. The Senate passed this version of the rule without discussion. The Senate's position on the *Bruton* sentence prevailed in Conference. The rationale for deleting the *Bruton* sentence was that the Evidence Rules should avoid trying to codify constitutional doctrine. No thought was given to the evidentiary question of whether the Rule would permit uncorroborated declarations against penal interest when offered by the prosecution.

8) Only one person in the entire legislative process flagged the anomaly of the one-way corroboration requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroboration requirement should not be imposed on the government. Associate counsel to the subcommittee responded that a corroboration requirement imposed on the government would be superfluous "because *Bruton* created a confrontation clause bar to all government offered penal interest statements by an unavailable declarant." Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would *never* be admissible as a constitutional matter, rendering a corroboration requirement for such statements unnecessary. Clearly, *Bruton* does not extend so far as to exclude all against-penal-interest statements offered against the accused.

Conclusion on Legislative History

It is fair to state that the one-way corroboration requirement for declarations against penal interest did not result from a considered decision by anybody involved in the process. Rather, it is a product of mistaken assumptions and oversight. Thus, an amendment changing the language of the corroborating circumstances requirement would not be contrary to the legislative history.

C. Criticism of the One-Way Corroboration Requirement

Commentators are unanimous in their view that the one-way corroboration requirement set forth in Rule 804(b)(3) is unfair, unwarranted, and possibly unconstitutional. For example, Professor Tague, supra, argues that the Rule as written violates a defendant's right to a fair trial because it imposes an evidentiary burden on the defendant that is not imposed on the prosecution. He cites *Washington v. Texas,* 388 U.S. 14 (1967), in which the Court invalidated a Texas statute that prohibited accomplices from testifying *in favor* of a defendant, but permitted accomplices to testify *against* a defendant.

Professor Jonakait, in *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 Utah Law Review 67, has this to say about the Rule 804(b)(3) corroboration requirement:

> Rule 804(b)(3) imposes a corroboration requirement on an accused seeking to admit a statement against penal interest, but not on the prosecution introducing such hearsay. Commentators have denounced the assymetric corroboration requirement as "constitutionally suspect," and a number of courts have responded by, in effect, rewriting the rule and creating a corroboration requirement for the prosecution as well.

Professor Jonakait urges amendment of the rule, but argues that in the absence of an amendment, the courts have the power "to disregard the literal language" of the rule and thereby "produce neutrality in the present version of Rule 804(b)(3)."

D. Federal Case Law Construing the One-Way Corroborating Circumstances Requirement

Many of the circuits have not read the corroborating circumstances requirement the way it is written. These circuits impose a corroborating circumstances requirement on the government as well as the accused. There are three reasons generally given for this divergence from the text of the Rule (to the extent the matter is discussed at all): 1) a showing of corroborating circumstances is required to protect the accused's right to confrontation — a rationale that, as will be discussed, is no longer applicable after *Crawford* and *Whorton v. Bockting*; 2) it makes no sense and is unfair to impose a corroboration burden on the accused, but not on the prosecution— a rationale that becomes more important after *Whorton v. Bockting*; and 3) it is efficient to have a unitary test for declarations against penal interest, rather than two different tests depending on the party offering the statement.

> **Here is a short summary of case law in the circuits imposing a corroborating circumstances requirement on the prosecution:**

First Circuit:

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) ("Although this court has not expressly extended the corroboration requirement to statements that inculpate the accused, we have applied the rule as if corroboration were required for such statements."); *United States v. Lubell,* 301 F.Supp.2d 88, 91 (D.Mass. 2007) (declarations against penal interest offered by the government are admissible only when corroborating circumstances clearly indicate that the statements are trustworthy; in this context, "corroboration does not refer to the credibility of the testifying witness or whether the witness' testimony conforms with other evidence in the case"; rather, corroborating circumstances "refers to only those that surround the making of the statement and render the declarant particularly worthy of belief.").

Fifth Circuit:

United States v. Alvarez, 584 F.2d 694 (5thCir. 1978): This is the most influential decision on the corroboration requirement as applied to government-offered statements. Most cases imposing a corroborating circumstances requirement on such statements simply do so by citing *Alvarez.*

The *Alvarez* court interpreted the legislative history on the one-way corroboration requirement as leaving it to the case law to develop corroboration requirements for inculpatory statements, in accordance with the requirements of the Confrontation Clause. The court reasoned that a corroboration requirement was essential to comply with the confrontation clause's "mandate for reliability." By imposing a corroboration requirement on the government, the court sought to "avoid the constitutional difficulties that Congress acknowledged but deferred to judicial resolution." This rationale is no longer applicable, as *Crawford* rejected a reliability-based test for confrontation, and *Whorton* held that if a hearsay statement is non-testimonial, the Confrontation Clause poses no reliability-based bar to admitting the statement.

But the *Alvarez* court also reasoned that "by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)." This quest for a unitary standard is as relevant today as it was when *Alvarez* was written.

Sixth Circuit:

United States v. Franklin, 415 F.3d 537, 547 (6th Cir. 2005) (inculpatory statement against penal interest was admissible when "corroborating circumstances truly establish the trustworthiness of the statement"); *Harrison v. Chandler,* 1998 WL 786900 (6th Cir. 1998) (holding that an inculpatory statement should have been excluded for failing to meet the corroboration requirement; dissenting opinion notes that imposing a corroboration requirement on the government is contrary to the text of the Rule).

Seventh Circuit:

United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) ("For the Rule 804(b)(3) exception to apply, the proponent of an inculpatory statement must show that * * * corroborating circumstances bolster the statement's trustworthiness.").

Eighth Circuit:

United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1986) (applying corroboration requirement to government-offered statements; relying in part on the defendant's right to confrontation); *United*

States v. Honken, 378 F.Supp.2d 928 (D. Iowa 2004) (statement offered by government must be supported by corroborating circumstances clearly indicating the trustworthiness of the statement; corroborating circumstances found because the declarant's statement was supported by independent evidence).

Eleventh Circuit:

United States v. Taggart, 944 F.2d 837 (11th Cir. 1991): (requiring corroborating circumstances for prosecution-offered statements; no analysis given).

Some Circuits have not decided whether to impose a corroboration requirement on statements offered by the government:

D.C. Circuit:

No discussion found.

Third Circuit:

United States v. Palumbo, 639 F.2d 123 (3d Cir. 1981) (post-custodial statement implicating defendant was not sufficiently disserving to be admissible; concurring opinion urges that prosecution be required to provide corroborating circumstances clearly indicating trustworthiness).

Ninth Circuit:

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995): In a prosecution arising out of arson of a home, the court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused. The court found that, even if such circumstances are required, they existed in this case.

Two Circuits have case law going both ways:

Second Circuit:

United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused.").

United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993) (noting that corroboration is required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroborating circumstances).

Fourth Circuit:

United States v. Workman, 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule.").

United States v. Carvalho, 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement).

E. State Variations

Five states explicitly impose a two-way corroboration requirement on against penal interest statements–meaning that the prosecution as well as the accused must set forth corroborating circumstances clearly indicating the trustworthiness of the statement. These states vary on application of the corroboration requirement to civil cases.

Six states contain a provision substantially limiting the use of declarations against penal interest when offered to inculpate the accused, by providing that such statements are inadmissible when they implicate both the declarant and the accused. Two states eliminate the corroboration requirement entirely. One state retains the one-way corroboration requirement but lessens the defendant's burden by requiring only that the circumstances "show" rather than "clearly indicate" trustworthiness.

II. Previous Attempt to Amend Rule 804(b)(3)

Two-way Corroborating Circumstances Requirement

At the April, 2000 meeting then-Chair Judge Shadur polled the Committee on whether it would be appropriate to amend Rule 804(b)(3) to provide for two-way corroboration in criminal cases. The Committee unanimously agreed in principle that it was fair, appropriate and necessary to propose an amendment to Rule 804(b)(3) that would require the prosecution to provide corroborating circumstances as a condition to admitting inculpatory declarations against penal interest. As Part One of this memorandum indicates, such a change accords with much of the existing case law. The Committee also noted that the change would be beneficial on two further counts: 1) It would resolve a split in the case law, given the fact that some courts apply the

corroborating circumstances requirement to declarations against interest offered by the government and others do not; and 2) It would end the anomaly of courts refusing to apply the rule as it is written.

Lowering the Threshold for Corroborating Circumstances?

The Committee next considered whether the Rule should be amended to lower the threshold of corroborating circumstances required to support admissibility under Rule 804(b)(3). The Rule currently requires a showing that corroborating circumstances "clearly" indicate the trustworthiness of the statement. Some judges and commentators have argued that this standard is too stringent. One possibility was to delete the word "clearly" from the Rule. Committee members noted, however, that deletion of the word "clearly", in light of the extensive case law on the subject, might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted under the exception. The Committee resolved unanimously to retain the word "clearly" in Rule 804(b)(3).

Eliminating the Corroborating Circumstances Requirement Entirely?

One way to level the playing field as to the corroborating circumstances requirement is to delete it from the Rule entirely. The Committee considered this possibility and quickly rejected it. As the legislative history above indicates, the corroborating circumstances requirement was a critical part of the rule — essential to getting the rule enacted. Moreover, on the merits, the Committee agreed with the concern initially expressed by Senator McLellan: there is a danger that an accused could enlist a declarant to confess to a crime, thus making a statement technically "against interest", without any real concern of punishment because all of the evidence pointed to the accused and not the declarant. The corroborating circumstances requirement tends to make it much more difficult for an accused to enlist a declarant, because that declarant by definition has to be one against whom the evidence is directed — such a declarant is likely to be reluctant to implicate himself falsely when there is a risk that his statement could be used in a viable prosecution against him.

Setting Forth the Standards for Corroborating Circumstances in the Text of the Rule?

The next issue considered by the Committee was whether the factors pertinent to the corroborating circumstances requirement should be explicated in the text of the Rule. The Committee resolved that any such explication would be problematic because it would create a risk that some pertinent factors might not be included. On the other hand, the Committee recognized that courts are in dispute over the meaning of "corroborating circumstances." In light of the conflicts in the case law in this and other respects, the Committee resolved that it would be helpful for any amendment to Rule 804(b)(3) to set forth a non-exclusive list of factors that are pertinent to the determination of corroborating circumstances. The Committee agreed, however, that such a list would be better placed in the Committee Note than in the text of the Rule.

Opposition to Two-Way Corroborating Circumstances Requirement

The Committee prepared an amendment that extended the corroborating circumstances requirement to government-offered statements. This amendment was opposed by the Department of Justice. The opposition was understandable in the sense that DOJ could not have been expected to invite the imposition of an extra admissibility requirement for declarations against interest offered by the prosecution. But DOJ also expressed the concern that a corroborating circumstances requirement would be redundant in light of the government's obligation to satisfy the reliability requirements of the then-existing case law under the Confrontation Clause.

Confrontation Requirement of Particularized Guarantees

DOJ's argument that the corroborating circumstances requirement would be redundant was not exactly correct. The reliability requirement imposed by the Confrontation case law at that time was not exactly the same as the "corroborating circumstances" language set forth in Rule 804(b)(3). Rather, the standard for constitutional reliability — for declarations against interest, which were not considered to fall within a firmly-rooted exception — was whether there were "particularized guarantees of trustworthiness." That standard is not only worded differently from the Rule 804(b)(3) test of "corroborating circumstances." It was also applied differently. Under the Confrontation Clause, "particularized guarantees" had to be found in the circumstances under which the hearsay statement was made — the court could not consider the existence of independent evidence corroborating the declarant's account. *See generally Idaho v. Wright,* 497 U.S. 805 (1990) ("particularized guarantees of trustworthiness" required for hearsay admitted under a non-firmly rooted exception, and corroborative evidence is irrelevant). Under Rule 804(b)(3), many courts have found that corroborating *evidence* can satisfy the standard of "corroborating circumstances clearly indicating the trustworthiness of the statement." So for example, corroborating circumstances can be found if the statement is verified by the defendant's own statement, testimony of eyewitnesses, or the existence of physical evidence. *See, e.g., United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions).

But the difference in the tests of "corroborating circumstances" and "circumstantial guarantees" led to a different argument when the proposed rule reached the Standing Committee: the DOJ then argued that the government should not be burdened with an *extra* admissibility requirement of corroborating circumstances when it already had to comply with the constitutional requirement of "particularized guarantees." The "level the playing field" justification for the amendment thus falls apart if the rule imposes more evidentiary requirements (confusingly similar requirements at that) on the government than are imposed on the accused.

Redrafting the Amendment to Comport With the Confrontation Clause

Ultimately the Committee agreed that the amendment could not be justified as a means of leveling the playing field, given the fact that the government already had to satisfy the reliability requirements of the Confrontation Clause. But the Committee then focused on a different, but no less important, concern: the fact that the existing Rule allowed the admission of hearsay in violation of the accused's right to confrontation. As written, the only admissibility requirement for the government is that the statement must be against the declarant's penal interest, when in fact the Confrontation Clause at that time required more: particularized guarantees of trustworthiness. The Committee thought it bad policy to have a hearsay exception that requires *less* than the Constitution. The Committee also thought it important to provide a protection for defendants against an inadvertent waiver of the reliability requirements then imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the constitution. A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because this Circuit requires corroborating circumstances for inculpatory statements against penal interest).

The redrafted amendment required the government to establish that a declaration against penal interest offered against the accused carry "particularized guarantees of trustworthiness." This language was chosen to track the language then used by the Supreme Court as the constitutional standard for hearsay that did not fit a firmly-rooted exception. The redrafted amendment was sent out for a new round of public comment. It was then approved unanimously by the Standing Committee — including the voting member of the DOJ. It was then approved by the Judicial Conference.

Supreme Court Action in Light of Crawford

But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford*, which shifted the Confrontation Clause from a focus on reliability to a focus on whether hearsay was testimonial. Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Rules Committee for reconsideration in light of *Crawford.* This action was not surprising, because the very reason for the amendment as redrafted was to bring the Rule into line with the Court's pre-*Crawford* Confrontation Clause jurisprudence. Now that the governing standards for the Confrontation Clause had been changed, it appeared that the proposed amendment did not meet its intended goal.

Relevance of Prior History

The prior history indicates that the major objection to extending the corroborating circumstances requirement to statements against penal interest offered by the prosecution was its problematic relationship with the standard of "particularized guarantees of trustworthiness" under the Confrontation Clause. That problem no longer exists. The Confrontation Clause no longer requires a showing of particularized guarantees of trustworthiness — that was made clear by *Whorton v. Bockting*. Thus, the need for a two-way corroborating circumstances requirement (and a level playing field) can now be addressed on its own terms.

It can also be argued that a corroborating circumstances requirement for government-offered statements is all the more critical after *Crawford* and *Whorton v. Bockting*. Those cases make clear that the Evidence Rules provide the *only* guarantee against admitting unreliable hearsay. If a hearsay exception is too permissive, there is no constitutional backstop. So if the Committee determines that the mere fact that a statement tends to disserve a declarant's interest is insufficient to guarantee that statement's reliability, then the amendment is more necessary now than it was when originally proposed. But of course it is for the Committee to determine whether against-penal-interest statements raise reliability concerns when uncorroborated.

III. Possible Concerns Raised by an Amendment to Rule 804(b)(3) That Would Implement a Two-Way Corroboration Requirement

A. Are Government-Offered Statements Potentially Unreliable in the Absence of Corroborating Circumstances?

One contention made in the public comment on the previous proposal was that inculpatory statements against interest are on the whole more reliable than exculpatory statements — so there is no reason to impose a corroborating circumstances requirement on declarations against penal interest offered by the government. The asserted difference in reliability is based on an assumption that there is a difference in the context in which the respective statements are ordinarily made. The following discussion considers the contexts in which inculpatory and exculpatory declarations against interest are usually made, in an effort to determine whether there is some class-wide differential in reliability between inculpatory and exculpatory statements against penal interest.

Contexts for Inculpatory Declarations Against Penal Interest

Of course, inculpatory statements are often made to police officers–e.g., a confession from an accomplice that "Joe and I robbed the bank" or "Joe supplied me with drugs." These statements are made under unreliable circumstances insofar as they identify another person, because the declarant may have an interest in currying favor with the authorities. But these are the kind of statements that, after *Williamson v. United States*, are not admissible because to the extent they identify the accused they are not "truly self-inculpatory" with respect to the declarant. And they are also testimonial under the Confrontation Clause.

After *Williamson* and *Crawford*, declarations against interest are only admissible against the accused if they have been made to perceived friends or associates under informal circumstances, in which there is no indication that the declarant is currying favor with the authorities with the anticipation that the statement will be used against the defendant at trial. *See, e.g., United States v. Saget,* 377 F.3d 233 (2d Cir. 2004) (accomplice's statements to an undercover officer, trying to enlist him in the defendant's criminal scheme was admissible under Rule 804(b)(3); the accomplice's statement was not barred by *Williamson,* because he didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant; for the same reason, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide); *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004) (accomplice's statement to his fiancee that he was going to burn down a nightclub for the defendant was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor; for the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks").

Contexts for Exculpatory Declarations Against Penal Interest

The circumstances in which exculpatory statements– e.g., the declarant says something like, "the drugs were mine, not the defendant's" or "the defendant is being charged with something that I did, not him"– have been offered have fallen into three basic categories: 1. Confessions to law enforcement officers; 2. Formal statements made to a lawyer, investigator, or the like, with the apparent intent to influence a litigation; and 3. Informal statements to friends or associates.

Unlike inculpatory statements, confessions made to law enforcement officers that directly *exculpate* the accused have sometimes been found self-inculpatory of the declarant even after *Williamson*. See, e.g., *United States v. Price,* 134 F.3d 340 (6th Cir. 1998) (statements made by declarant in custody, indicating that the drugs were the declarant's and that Price was present but not involved, were self-inculpatory). The reason for this "asymmetry" has been expressed by the Ninth Circuit in *United States v. Paguio,* 114 F.3d 928 (9th Cir. 1997):

> When the prosecution attempts to take advantage of the rule, as in *Williamson*, the statement is typically in the form, "I did it, but X is guiltier than I am." As a matter of common sense, that is less likely to be true of X than "I did it alone, and not with X." That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.
>
> Prosecution use of an unavailable declarant's accusation of the defendant, as in *Williamson*, raises different concerns from a defendant's use of an unavailable declarant's confession which exonerates him. ... The Constitution gives the "accused," not the government, the right of confrontation. ... The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence. ... We raise the constitutional asymmetry because it helps explain why application of the rule of evidence is to some extent asymmetrical between defense and prosecution.

Thus, an exculpatory statement in custody usually tends to disserve the declarant's interest because it is not an attempt to curry favor with the authorities (far from it) and could serve to aggravate the declarant's offense. In contrast, a statement in custody identifying the defendant as a perpetrator does not tend to inculpate the declarant after *Williamson* because of the likelihood that the declarant is currying favor with the authorities by identifying other participants in the crime. *See also United States v. Nagib,* 56 F.3d 798 (7th Cir. 1995) (statements exculpating the defendant, made by the declarant at his own sentencing, were all sufficiently against the declarant's penal interest: "[T]here is no indication in the record that [the declarant] attempted to curry favor with the authorities when making his statement at sentencing. There is no record of any plea agreement or downward departure for cooperation.").

None of this proves the proposition, however, that exculpatory statements are made under less reliable circumstances than inculpatory statements. Rather, in the context of statements made in custody, it shows that the statements are made under the same circumstances but that exculpatory statements are *more* reliable than inculpatory statements.

The second type of situation in which exculpatory statements are made is where the declarant makes a prepared statement that takes responsibility for the crime and exculpates the defendant, after the defendant has already been charged with the crime. These statements often are made in defense counsel's office or to a private investigator retained by the defendant. They are roughly comparable to plea allocutions that inculpate the defendant, in the sense that they are made in the context of the formalities of litigation.

In a few cases, formal statements exculpating an accused and made in anticipation of litigation have been found self-inculpatory with respect to the declarant's penal interest. As such they have been found admissible (so long as corroborating circumstances are found) without the need to redact any direct references to the accused. The leading case is *Paguio, supra,* in which the defendant's father made statements to the defense attorney, to the effect that the father had masterminded a scheme and the defendant was an unwitting dupe who had "nothing to do with" the charged fraud. The trial court admitted only the statements in which the father admitted his own activity, and excluded all direct references to the defendant's innocence. The Court of Appeals reversed, finding that the statements directly exculpating the defendant were disserving to the father's penal interest and so should have been admitted. The Court stated that in context, "the father's statement that his son had nothing to do with it was inculpatory of the father as well as exculpatory of the son. The father admitted not only participation but leadership, leading his son and daughter-in-law into the abyss. Because leading others into wrongdoing has always been seen as especially bad, there is a sentencing enhancement for it." The Court also found sufficient corroborating circumstances guaranteeing the trustworthiness of the statement–there was a good deal of evidence supporting the contention that the father was the lead player and the son did not know what was going on; and while the father may have been acting under a motive of love for his son, this was not enough to overcome the corroborating evidence.

Most courts, however, have excluded exculpatory statements when they are made under formal circumstances in an apparent attempt to influence the defendant's trial. Sometimes the reasoning is that the declarant has some motive that overwhelms any disserving aspect of the statement, and therefore the statement is not sufficient disserving under *Williamson*. Thus, in *United States v. Alvarez,* 266 F.2d 587 (6th Cir. 2001), the defendant was charged with murdering a drug dealer who owed him money on a drug deal. The defendant proffered a statement from another drug dealer that the victim owed that dealer money on a different drug debt. This statement was offered to show that others had the motive to kill the victim. The statement was made in defense counsel's office, after counsel told the declarant that there was no way that he could be convicted on the basis of the statements. The Court found that under these suspicious circumstances, the statement was not sufficiently disserving of the declarant's interest to qualify under *Williamson*.

Other courts have held statements made in an apparent attempt to influence the defendant's trial to be inadmissible because the accused failed to provide corroborating circumstances clearly indicating trustworthiness. *See, e.g., United States v. Lowe,* 65 F.3d 1137 (4th Cir. 1995) (defendant charged with shooting a person at a picket line with a Colt revolver; the defendant wants to prove that before the incident he sold his Colt revolver to Starkey, a fellow union member; Starkey made a statement to his attorney that he bought the gun from the defendant; this statement was properly

excluded for lack of corroborating circumstances; the statement was made in an apparent attempt to exculpate a fellow union member who had already been charged; while the statement was technically disserving, it was not substantially so, because the evidence pointed to the defendant's presence at the crime, not Starkey's).

In sum, where an exculpatory statement is made in an apparent attempt to influence the defendant's litigation, there are often trustworthiness problems, and these problems are handled by a finding either that the statement is not disserving to the declarant or that there is an insufficient showing of corroborating circumstances indicating trustworthiness. This does not mean, however, that comparable statements are necessarily more reliable. And in any case, an inculpatory statement made with an attempt to influence a litigation would be excluded because it is testimonial.

The third situation in which exculpatory statements are made is identical to the circumstances in which most admissible inculpatory statements are made–the declarant makes a statement informally to a trusted friend, relative or associate. These statements are ordinarily found disserving, but sometimes they are eventually excluded because the defendant is unable to prove corroborating circumstances clearly indicating the trustworthiness of the statement. See, e.g., *United States v. Camacho,* 163 F.Supp.2d 287 (S.D.N.Y. 2001) (motion for new trial based on statement made by declarant to a friend in a prison library that the defendant was convicted for a crime that the declarant committed; the Court founds the statement disserving to the declarant's interests, but finds corroborating circumstances unclear, because the declarant has made some inconsistent statements and the evidence of the defendant's participation cuts both ways); *United States v. Brown,* 1997 WL 570348 (6th Cir.) (unpublished) (statement from the defendant's brother to his friend that the brother committed robberies charged to the defendant was against the brother's penal interest; but the statements were properly excluded for lack of corroborating circumstances, because the evidence indicated that the brother was not in town on the dates on which the robberies occurred). Thus, in an identical fact situation–informal statements made to trusted persons–inculpatory statements can be admitted without a showing of corroborating circumstances while exculpatory statements are excluded without such a showing. There seems to be no justification for this distinction.

To sum up on the question of whether asymmetry is justifiable due to difference in circumstances under which inculpatory and exculpatory statements are mad:

Inculpatory statements and exculpatory statements found disserving are often made under similar circumstances–informally to a friend or associate. Given the factual similarity, it seems hard to justify the asymmetry of the corroborating circumstances requirement. Exculpatory statements are also made under more suspicious circumstances, such as in an apparent attempt to influence litigation. In this situation, there is good reason to impose a corroborating circumstances requirement, but that means nothing with respect to comparable inculpatory statements, as they would be testimonial and not admissible in any case. In a third situation, statements in custody, exculpatory statements are usually found disserving and inculpatory statements are not. There is good reason to require corroborating circumstances in this situation for exculpatory statements; but

again it does not follow that corroborating circumstances are unnecessary in those cases where inculpatory statements are found disserving.

Example of the Usefulness of a Corroboration Requirement for Against-Penal Interest Statements Offered Against an Accused

Even if there is no reliability distinction between inculpatory and exculpatory penal interest, it could be argued that an amendment is not necessary to extend the corroborating circumstances requirement. The argument would be that if the statement is disserving under *Williamson*, it is quite reliable enough to be admissible against the accused. An example might have to refute that argument. One good example is *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000). Kartoum and Al-Qaisi were brothers-in-law involved in a theft operation. Kartoum made statements to Al-Qaisi concerning a prior theft operation in which he and Shukri were involved. He mentioned Shukri by name as his former confederate. On appeal, Shukri conceded that Kartoum's statements were disserving under *Williamson*: they were not made to curry favor or shift blame, and by identifying Shukri, Kartoum admitted not only to theft, but also to a conspiracy with an identified individual. Thus, the statement was "truly self-inculpatory" even insofar as it identified Shukri by name. Shukri argued, however, that Kartoum's statement did not satisfy the "corroborating circumstances" requirement of the Rule.

The Court noted that Shukri's strategy of conceding that the statement was against interest but that there were insufficient corroborating circumstances was a sound one, because lack of corroborating circumstances was the stronger argument–thus the Court implicitly noted that there is a difference between the two requirements.

The *Shukri* Court found that the corroborating circumstances requirement (that the Seventh Circuit has read into the Rule for inculpatory statements) was met under the facts of the case:

> Carrying $2,800 in case, Shukri suddenly left his store in the middle of the day to help Kartoum * * * rent storage space and move merchandise from the Orland Park warehouse. Shukri assisted Kartoum * * * even though he [subsequently admitted that he] felt that the goods were stolen and knew that the police were investigating. Furthermore, Kartoum and Al-Qaisi [the witness] shared a confidential relationship within which candor is presumed: they are brothers-in-law and were confederates in a theft conspiracy at the time of Kartoum's statements. Statements between confidants are generally more reliable and trustworthy because such relationships bespeak candor and confidence. Shukri was closely involved with Kartoum * * * in possessing and transporting stolen goods, and Kartoum's statements were consistent with Shukri's involvement."

Most of the corroborating circumstances pointed to are in the nature of corroborating evidence. One factor–the statement was made to a trusted confidant– is a circumstantial guarantee of reliability.

To show the necessity for the corroborating circumstances requirement as defined to include *both* evidentiary corroboration and circumstantial guarantees of reliability, consider the situation if all of the factors in the blocked paragraph are missing. Then what would be admitted is Kartoum's statement to an associate that Shukri was involved in a prior theft operation. While this is technically disserving, its admission should be questioned if the government could provide nothing else to support the truth of the statement. Certainly Kartoum could have had other motivations for implicating Shukri in a prior crime–he might hate Shukri, he might be settling a score, Shukri might have stolen his wife. He might be crazy. And while mentioning Shukri by name does in some sense subject Kartoum to a risk of conviction for conspiracy, it would not take much for Kartoum to falsely substitute the name of Shukri for the real coconspirator.

These reliability concerns are significantly mitigated by the factors that are listed in the blocked paragraph. Most importantly, the presence of significant corroborating evidence indicates that Kartoum was not in fact making up a story and was not falsely implicating Shukri for some nefarious motive. Indeed, the corroborating evidence seems to answer any reliability concerns even without the circumstantial guarantee that Kartoum was speaking to his trusted brother-in-law. Taken from another angle, if one were to consider the statement without any corroborating evidence–disserving because made to a trusted confidante with no attempt to shift blame–there would still be cause for concern about the reliability of the statement. People say many things to their in-laws that are not true. Kartoum could think that there is really no cost to smearing Shukri by an assertion of criminal conduct: because the statement is made to his brother-in-law, it is unlikely to be disclosed to the authorities and therefore unlikely to get Kartoum in trouble. Thus, it is the corroborating evidence that provides the most assurance that Kartoum is telling the truth.

The importance of corroborating evidence is recognized in trials every day. A witness's testimony about a financial transaction might seem highly doubtful–until the records are produced. The statement of a dubious eyewitness that the defendant robbed a bank may seem untrustworthy–until trace money and an exploded paint canister are found in the defendant's bedroom. It is clear that corroborating evidence can alleviate concerns over the unreliability of hearsay in the same way as it does with respect to witness testimony.

Relationship of Corroboration Requirement to the Co-conspirator Exception to the Hearsay Rule

It would not seem unduly burdensome for the government to provide some evidence corroborating the truth of a hearsay statement offered to prove the defendant's guilt. Hopefully such corroborative evidence would be provided as a matter of course. In the analogous area of coconspirator statements, the government is required by Rule 801(d)(2)(E) to provide independent corroborating evidence of a conspiracy before coconspirator hearsay can be considered by the jury. This requirement has not seemed unduly burdensome, and has served to protect defendants from being convicted solely out of the mouths of self-appointed coconspirators.

Indeed there is an anomaly that exists when corroborating evidence is required for the coconspirator exception but not for the against penal interest exception. If a statement of a coconspirator is offered under Rule 801(d)(2)(E) it must be corroborated with independent evidence of conspiracy. Yet under Rule 804(b)(3), as it currently reads, the same statement is admissible without any corroboration, because it is disserving to the declarant's interests when made to associates and the like in furtherance of the conspiracy. So the absence of a corroborating evidence requirement in Rule 804(b)(3) may allow a prosecutor to ignore the procedural and substantive safeguards of Rule 801(d)(2)(E).

Ultimately it is for the Committee to decide whether the current state of affairs raises an unacceptable risk of unreliable hearsay being admitted against an accused. If the Committee decides that such a risk does exist, then an amendment should be proposed. What follows is a discussion of whether such an amendment should deal with any problems other than the one-way corroborating circumstances requirement.

B. Should the Amendment Address the Possibility that Statements Admitted Under the Exception Might Be Testimonial?

If the Committee decides to propose an amendment to Rule 804(b)(3), an obvious question is whether the amendment should also treat the impact that *Crawford* has on the admissibility of declarations against penal interest in criminal cases. If the text of the Rule must be amended to accommodate *Crawford*, then that fact cautions against any amendment at all. Amending only one hearsay exception to accommodate *Crawford* may send the wrong signal, i.e., that the exception for declarations against interest is the only exception that raises a *Crawford* issue. That would be an assumption that would be inaccurate, as the Committee (while keeping track of *Crawford*) has not done a systematic analysis of which exceptions might be problematic after *Crawford* — arguably the case law has not settled down sufficiently for such a systematic analysis to be useful. At any rate, it would presumably be better to treat all of the problematic exceptions (assuming there are any) at one time.

An important question, then, is whether it would be necessary to add language to the text of Rule 804(b)(3) to account for the possibility that the existing rule permits the admission of testimonial hearsay against the accused. [Note that adding a corroboration requirement does not address any *Crawford* concern: if a declaration against interest is testimonial, it wouldn't matter that it is corroborated.]

With one possible wrinkle, it appears that Rule 804(b)(3) after *Williamson* tracks exactly with *Crawford*. That is, the only statements admissible against the accused under Rule 804(b)(3) are those that are by definition non-testimonial. A statement is testimonial when the *primary motivation* of preparing the statement is to use it in a criminal investigation or prosecution. *Davis v. Washington*, 126 S.Ct. 2266 (2006) (employing the "primary motivation" test). For statements of a declarant implicating an accused, the primary motivation test will only be satisfied if the statement is made

knowingly to law enforcement officers. Yet those are the statements that are not sufficiently disserving to the declarant under *Williamson.*

The case law after *Crawford* bears out the assertion that admissibility under *Williamson* and *Crawford* follow the same track — to be disserving means to be non-testimonial, to be testimonial means that the statement is not disserving. *See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders; these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement; for similar reasons, the statements were admissible under Rule 804(b)(3));*United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (statements made informally to a friend were not testimonial and for the same reason admissible under Rule 804(b)(3)).

Now to the wrinkle: In *Williamson*, Justice O'Connor (writing only for herself and Justice Scalia), asserted that an accomplice's statement, even though made to law enforcement, *could* be admissible so long as it does not identify the accused specifically by name. For example, assume the defendant is being tried for selling drugs to Joe. Joe is arrested and tells the police: "I bought drugs on the dock last night." This statement does not directly implicate the accused. Under Justice O'Connor's view, the statement could be introduced in the defendant's trial as a declaration against Joe's penal interest, even though it is a product of interrogation by law enforcement. The statement would be probative of a sale between Joe and someone on the dock that night. Then the government would have to introduce connecting evidence indicating that the defendant was on the dock that night. In contrast, if Joe had said, "I bought drugs from the defendant last night", the statement would not be admissible under *Williamson*, because the identification of the defendant could have been part of an attempt to shift blame or curry favor with the authorities.

Justice O'Connor's view, that an accomplice's statement to law enforcement could be admissible against the accused to the extent it did not identify him directly, was rejected by four Justices in Williamson, and was assumed arguendo to be correct by three others.[1] The merits of Justice O'Connor's view are questionable, however. When an accomplice makes a statement admitting crime to a police officer, it is very hard (if not impossible) to differentiate disserving from self-serving motivation. An accomplice who admits a crime may well know under the circumstances that the admission, in context, implicates another specific person; that is, specific identification of that person is probably unnecessary under most circumstances. If the premise of currying favor with law enforcement is accepted, there is no real basis for dividing up a statement based on direct and indirect implication of the accused. If nothing else, that kind of division blinks reality. As a practical matter, where the accomplice makes a statement like "I bought drugs on the dock last night," he knows what the next question will be---"who from?" And he knows that an answer is expected in order for him to find favor with law enforcement. So even where the entire statement is an indirect accusation, it is usually of a piece with a direct accusation.

[1] Justices Blackmun, Stevens, Souter, and Ginsburg believed that statements made to law enforcement were barred under the exception, whether or not they directly implicated the accused. Justice Kennedy, joined by Justice Thomas and Chief Justice Rehnquist, concurred in the judgment, but appeared to accept Justice O'Connor's view, at least arguendo.

The interpretation of Rule 804(b)(3) by Justices O'Connor and Scalia is therefore questionable, and most importantly, nonbinding. Nonetheless, a number of lower courts after *Williamson* (and before *Crawford*) appeared to follow the view that statements by accomplices to law enforcement are admissible if they do not directly identify the accused as having taken part in the crime. This is the rationale for admitting an accomplice's guilty plea allocution under Rule 804(b)(3). Some courts before *Crawford* allowed the allocution statements of an accomplice to be admitted against the defendant so long as the statements were redacted to excise any identification of the accused as taking part in the crime. *See, e.g., United States v. Aguilar*, 295 F.3d 1018, 1020 (9th Cir. 2002) (admitting redacted plea allocution under Rule 804(b)(3) to show the existence of a conspiracy); *United States v. Centracchio*, 265 F.3d 518, 524--30 (7th Cir. 2001) (same).

After *Crawford*, an accomplice statement made to law enforcement during interrogation, or as part of a plea allocution, cannot be admitted against the accused, whether or not it implicates the accused directly. The constitutional question after *Crawford* is not whether the statement is sufficiently reliable or sufficiently against the declarant's interest. The question is whether the statement is testimonial, and the *Crawford* Court clearly held that accomplice statements made to law enforcement are testimonial. Indeed, the plea allocution cases that had adopted Justice O'Connor's view of Rule 804(b)(3) were rejected in *Crawford* as a constitutional matter, the Court citing the cases as examples in which courts "have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine." *See also United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (holding, post-*Crawford*, that plea allocution statement of accomplice was testimonial, even though it was redacted to take out any direct reference to defendant).

The opening seen by Justice O'Connor for admissibility of some accomplice statements made to law enforcement has therefore been closed as a constitutional matter by *Crawford*. Lower courts after *Crawford* have accordingly held that the Confrontation Clause is violated whenever any part of an accomplice statement made during interrogation by law enforcement (or in other formal circumstances) is introduced against the accused. They hold it irrelevant under *Crawford* that the statement incriminated the accused indirectly rather than directly. For example, in *United States v. Jones*, 371 F.3d 363 (7th Cir. 2004), an accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against penal interest (a question it found unnecessary to decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement.

Given the fact that *Crawford* is not contiguous with Justice O'Connor's view in *Williamson* about the admissibility of against-penal-interest statements made by accomplices to law enforcement, the question is whether a proposed amendment to Rule 804(b)(3) should be revised to take account of this discrepancy. It might well be unnecessary, because Justice O'Connor's view of Rule 804(b)(3) was not widely embraced even before *Crawford* and completely rejected after it. There seems little danger of Rule 804(b)(3) being unconstitutionally applied by embracing a declaration against interest that is testimonial because it was made to law enforcement.

If the Committee remains concerned about the possibility that a testimonial statement may nonetheless be found admissible under Rule 804(b)(3), and yet wishes to proceed with the amendment, it might consider adding language that would specifically exclude statements made to law enforcement.

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement is also not admissible if the declarant knew that it was made to a government official and it is offered against an accused.

This added language (underlined above) would probably make the exception at least contiguous with *Crawford*. It would clearly exclude the against-penal-interest statements found testimonial under *Crawford*. And it would admit against-penal-interest hearsay when made to friends and loved ones in informal circumstances.

On the other hand, it could be argued that it is not worth all the trouble for such a remote possibility, and addressing the *Crawford* issue in the text could raise questions about other exceptions that are not amended. If that is so, then perhaps any possible question of unconstitutional application could be handled by Committee Note. The Committee Note could read something like this:

> The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford*. *See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders; these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement; for similar reasons, the statements were admissible under Rule 804(b)(3));*United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (statements made informally to a friend were no-testimonial and for the same reason admissible under Rule 804(b)(3)).

The possibilities of 1) amending the text, and 2) treating the *Crawford* issue in the Committee Note, are set forth in drafting alternatives at the end of this memo.

C. Should the Corroborating Circumstances Requirement Be Explicated in the Text of the Rule?

When the Committee previously considered an amendment to Rule 804(b)(3), it decided that it would not attempt to define the term "corroborating circumstances." The Committee was concerned that the list would not be comprehensive, and noted that no other Evidence Rule sets forth a list of factors relevant to admissibility.

This is not to say that there are no problems with the current case law on "corroborating circumstances." *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). The most important conflict is whether a showing of "corroborating circumstances" can include corroborative *evidence.* For example, if the declarant says "Joe and I robbed the bank," can the government attempt to meet the corroborating circumstances requirement by showing that after the robbery, Joe bought an expensive car, opened a Swiss bank account, was seen driving quickly away from the bank, etc.?

In defining "corroborating circumstances," some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account); *United States v. Honken,* 378 F.Supp.2d 928 (D. Iowa 2004) (statement offered by government must be supported by corroborating circumstances clearly indicating the trustworthiness of the statement; corroborating circumstances found because the declarant's statement was supported by independent evidence). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The holdings that reject the use of corroborative evidence stem from decisions in those circuits that conflated the then-applicable constitutional standard with the Rule's requirement of corroborating circumstances. Those courts relied on *Idaho v. Wright, supra,* which held that under the Confrontation Clause, the requirement of "particularized guarantees of trustworthiness" could not be satisfied by reference to corroborative evidence — the statement had to be shown reliable given the circumstances under which it was made. But there was no reason to import the *Wright* analysis into the different, rule-based standard of "corroborating circumstances" in Rule 804(b)(3). And there is, of course, much less reason to do so now, because the *Wright* analysis has been abrogated by the Supreme Court in *Whorton v. Bockting.* Yet the courts rejecting the use of corroborative evidence under Rule 804(b)(3) *still* rely on *Wright. See, e.g., United States v. Lubell,*

301 F.Supp.2d 88, 91 (D.Mass. 2007) ("In this context, corroboration does not refer to the credibility of the testifying witness or whether the witness' testimony conforms with other evidence in the case. Rather, corroborating circumstances refers to 'only those that surround the making of the statement and that render the declarant particularly worthy of belief.' *Idaho v. Wright*, 497 U.S. 805, 819 (1990)").

If the Committee wishes to proceed with an amendment to Rule 804(b)(3), it may wish to address the conflict on whether "corroborating circumstances" can include corroborative evidence. It would seem to make most sense to adopt a rule that corroborative evidence *can* be considered. The ultimate inquiry is whether the hearsay statement is truthful, and corroborative evidence is certainly relevant, as a general matter, in assessing truthfulness — corroborative evidence is used in every trial, and more broadly every day in real life. It is an analysis that is used in assessing admissibility under the co-conspirator exception, see *Bourjaily v. United States,* 483 U.S. 171 (1987), and there appears to be no reason to reject corroborative evidence in the analysis of admissibility under Rule 804(b)(3).

The relevance of corroborative evidence could be endorsed in the text of the rule without running the risk of adding a checklist of factors that might be incomplete. One possible solution is to amend the text as follows (the other possible amendments to the rule are also included):

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. "Corroborating circumstances" includes evidence corroborating the declarant's assertions. A statement is also not admissible if the declarant knew that it was made to a government official and it is offered against an accused.

Alternatively, the Committee might consider treating the matter of corroborative evidence in the Committee Note. *This is probably not a recommended alternative, though, because it amounts to an attempt to change the law through a Committee Note.* Should the Committee decide to proceed with an entry in the Committee Note, the relevant passage of a Committee Note might look like this:

> The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts

the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997). The Committee has determined that "corroborating circumstances" should include corroborative evidence. The existence of corroborating evidence is a common means of verifying the accuracy of an assertion. Moreover, corroborative evidence is relevant in establishing the foundation requirement for the co-conspirator exception to the hearsay rule — see *Bourjaily v. United States,* 483 U.S. 171 (1987) — and there is no reason for a different analysis under Rule 804(b)(3).

Alternatively, the Committee Note could simply raise the issue of the conflict over the meaning of corroborating circumstances, and take no position. This was the option chosen by the Committee when Rule 804(b)(3) was initially proposed. Here is the example for that alternative.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

These drafting alternatives will be more fully set forth in the last section of this memo.

D. Should the Corroborating Circumstances Requirement Be Extended to Civil Cases?

In *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999), the court considered whether the corroborating circumstances requirement applied to declarations against penal interest offered in civil cases. Favia, an employee of American, was discovered by the company to have written checks to fictional accounts. When confronted, he admitted that he cashed the checks for his own benefit, receiving payment for the checks from Fishman, who took a fee for the service. American sued Fishman to recover the funds, arguing that Fishman was in on the fraud. Favia's statements to his employer were offered as declarations against Favia's penal interest. The magistrate judge found that American had not met its burden of showing that the statements were supported by corroborating circumstances clearly indicating their trustworthiness; summary judgment was granted for Fishman.

On appeal, American argued that it was not necessary to provide corroborating circumstances for declarations against interest in civil cases. It noted that the second sentence of Rule 804(b)(3) does not by its terms apply to civil cases. It recognized that the Seventh Circuit has, like most circuits, read the Rule beyond its terms to apply to inculpatory declarations offered in *criminal* cases. But American found two reasons to distinguish that extension from an extension to civil cases. First, the extension of the corroborating circumstances requirement to statements offered against an accused had been justified by a concern over the accused's right to confrontation–that right is inapplicable in civil cases. [Note that this distinguishing argument is no longer viable after *Whorton v. Bockting*, because the Confrontation Clause is no longer concerned with non-testimonial hearsay, the only kind admissible under Rule 804(b)(3).] Second, the Supreme Court's decision in *Williamson* rendered it unnecessary to extend the corroborating circumstances requirement to civil cases. This was assertedly because, after *Williamson*, each statement offered must be "truly self-inculpatory." The significant protection rendered by *Williamson*, American argued, meant that an additional requirement of corroboration would be excessive, if not in all cases, at least in civil cases.

The *Fishman* court rejected these arguments and held that the corroborating circumstances requirement applied to declarations against interest offered in civil cases. It made two major points:

> 1. It is important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered.
>
> 2. Nothing in *Williamson* prevents an across-the-board application of the corroborating circumstances requirement. *Williamson* simply emphasized that "the Rule 804(b)(3) inquiry must be fact-intensive." That is what the corroboration sentence of the Rule requires as well.

The Evidence Rules Committee's initial proposal to amend Rule 804(b)(3) would have extended the corroborating circumstances requirement to civil cases — relying on *Fishman.* That proposal received a negative public comment from the American College of Trial Lawyers. The College argued that it would "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so." The College thought that any change to civil cases should at least await more case law on the subject.

Other public comments were favorable, however, noting the benefit of having a unitary standard for admissibility of declarations against interest in all cases.

If the Committee wishes to extend the corroborating circumstances requirement to civil cases, it need only delete the language "and offered to exculpate the accused" from the Rule. Here is what it would look like (together with previously discussed amendments):

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. "Corroborating circumstances" includes evidence corroborating the declarant's assertions. A statement is also not admissible if the declarant knew that it was made to a government official and it is offered against an accused.

Striking the language as above extends the corroborating circumstances requirement to all cases. It would then be prudent to refer to the extension to civil cases in the Committee Note. The Committee Note to the initial proposal contained the following passage:

> The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories,*

Inc. v. Fishman, 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

If the Committee does *not* wish to extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases, but still wishes to extend the requirement to statements offered by the prosecution, then the text of the amendment requires some adjustment. Here is a possibility (including other amendments previously discussed):

> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. "Corroborating circumstances" includes include evidence corroborating the declarant's assertions. A statement is also not admissible if the declarant knew that it was made to a government official and it is offered against an accused.

The problem with this language is that *it ends up changing the law in the 7th Circuit.* If the Committee believes that it is substantively wrong to require corroborating circumstances for declarations against penal interest in civil cases, then this change would be warranted.

But if the Committee simply wishes not to deal at all with civil cases — to leave the law where it found it — then it has a problem. That option does not seem possible within the text of the Rule. If the Committee wishes to extend the corroboration requirement to statements offered by the government, then something must be said, implicitly or explicitly, about civil cases. Thus one consequence of amending the Rule is that the Committee must face the question of the applicability of the corroborating circumstances requirement in civil cases. I have not discovered any reported case other than *Fishman* that deals with this question.

IV. Drafting Alternatives

This section sets forth the drafting alternatives that were addressed in the previous section. It should be noted that these drafts *have not been fully restyled.* The determination was made that it was not necessary to burden Professor Kimble with restyling multiple drafts when the Committee has not even voted on whether it is necessary to amend the Rule. But Professor Kimble was kind enough to provide some suggestions as to the new sentences.

Assuming that the Committee decides to extend the corroborating circumstances requirement to declarations against interest offered by the prosecution — the fundamental reason for an amendment — then there are three further drafting alternatives:

1. Defining the corroborating circumstances requirement to include corroborative evidence, either in the text or in the Committee Note.

2. Dealing with the impact of *Crawford*, either in the text or in the Committee Note.

3. Extending the corroborating circumstances requirement to civil cases, or limiting it to criminal cases.

Two basic models are presented. Model One might be called the "expansive" model. It adds language to the text to deal with corroborative evidence and *Crawford*, and extends the corroborating circumstances requirement to civil cases. Model Two might be called the "limited" model. The change to the text is only to extend the corroborating circumstances to declarations against interest offered by the government in criminal cases. It then provides passages in the Committee Note to deal with the other issues. The Committee could of course delete these passages for an even more limited amendment. And of course the Committee could mix and match the models depending on what issues members wish to address.

Note that the basics of the Committee Note are lifted from the Committee Note that was previously approved by the Evidence Rules Committee, the Standing Committee and the Judicial Conference.

Drafting Model One: Treating Crawford, Corroboration, and Extending Corroborating Circumstances to Civil Cases.

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

statement unless believing it to be true. ~~A~~ But a statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. "Corroborating circumstances" includes evidence corroborating the declarant's assertions. A statement is also not admissible if the declarant knew that it was made to a government official and it is offered against an accused.

Proposed Committee Note

The second sentence of the Rule has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The amendment also rectifies some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases"). Some courts look to whether extrinsic evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account); *United States v. Honken,* 378 F.Supp.2d 928 (D. Iowa 2004) (corroborating circumstances found in part because the declarant's statement was supported by independent evidence).. Other courts hold that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997). The Committee has determined that "corroborating circumstances" should include corroborative evidence. The existence of corroborating evidence is a common means of verifying the accuracy of an assertion. Moreover, corroborative evidence is relevant in

establishing the foundation requirement for the co-conspirator exception to the hearsay rule — see *Bourjaily v. United States,* 483 U.S. 171 (1987) — and there is no reason for a different analysis under Rule 804(b)(3).

The last sentence of the Rule addresses the relationship between the hearsay exception for declarations against penal interest and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford. See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders; these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement; for similar reasons, the statements were admissible under Rule 804(b)(3));*United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (statements made informally to a friend were no-testimonial and for the same reason admissible under Rule 804(b)(3)). The Committee nonetheless determined that the rule should make clear that it does not create a hearsay exception for statements that are testimonial under *Crawford.*

Drafting Model Two: Avoiding Crawford and Corroboration, and Limiting the Corroborating Circumstances to Criminal Cases.

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Possible Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account); *United States v. Honken,* 378 F.Supp.2d 928 (D. Iowa 2004) (corroborating circumstances found in part because the declarant's statement was supported by independent evidence). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford. See, e.g., United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007) (accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders; these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement; for similar reasons, the statements were admissible under Rule 804(b)(3));*United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005) (statements made informally to a friend were no-testimonial and for the same reason admissible under Rule 804(b)(3)).

V. Previously Rejected Drafting Alternatives

In the interest of completeness, this section of the memorandum sets forth the drafting alternatives that were rejected by the Committee at its April, 2000 meeting. Including them herein does not suggest that any of them should be reconsidered. The rejected drafts are for included simply for background purposes, especially for new Committee members.

Alternative 1: Deletion of the Corroboration Requirement

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

Draft Committee Note to this Alternative

The corroborating circumstances requirement of the Rule has been deleted. See Ind.R.Evid. 804(b)(3); Tenn.R.Evid. 804(b)(3). The corroborating circumstances requirement has created confusion among the courts on at least two subjects. First, courts have disagreed on whether the requirement applied only to statements offered by an accused, or whether it also applied (in the absence of statutory language) to statements offered by the prosecution. *Compare United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused."), *with United States v. Bakhtiar,* 994 F.2d 970 (2d Cir. 1993) (noting that corroborating circumstances are required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroboration). *See also United States v. Workman,* 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule."); *United States v. Carvalho,* 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement). Second, the courts have disagreed on what factors are relevant to a showing of corroborating circumstances. See *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1989) ("the precise meaning of the corroboration requirement in Rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases"). Also, some courts have held that in assessing corroborating circumstances, the court had to consider whether the witness who heard the statement was a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness). Other courts prohibited such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985); *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000). Finally, courts have looked to whether extrinsic evidence supported or contradicted the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account). Other courts have held that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United*

States v. Barone, 114 F.3d 1284 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The Committee believes that deletion of the corroborating circumstances requirement will bring uniformity to the law without sacrificing the interest in excluding unreliable hearsay. Under *Williamson v. United States,* 512 U.S. 594 (1994), a declaration against penal interest must be "truly inculpatory" to the declarant's interest, given the circumstances under which the statement was made, before it can be admitted. The *Williamson* Court's construction of the first sentence of Rule 804(b)(3) assures that any statement offered under the exception must have substantial guarantees of trustworthiness.

Reporter's Note:

As discussed in this memo, this alternative was rejected by the Committee because of two concerns: 1) deleting the corroborating circumstances requirement would upset a significant body of existing case law; and 2) despite the reliability guarantees set forth in *Williamson*, there is a substantial risk that deletion of the corroborating circumstances requirement would mean that dubious hearsay from unreliable declarants will be admitted.

Alternative 3: Across-the-Board Corroboration Requirement, With Statutory Elaboration of Relevant Corroboration Factors.

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. In assessing corroborating circumstances, the court must consider (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for matters related in the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the person or persons to whom the statement was made, (5) the relationship between the declarant and the opponent of the evidence, and (6) the nature and strength of any independent evidence relevant to the conduct in question.

Proposed Committee Note for this Alternative:

The second sentence of the Rule has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

A third sentence has been added to the Rule to clarify the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases"). The corroborating circumstances requirement has created confusion and dissension among the courts. For example, some have held that in assessing corroborating circumstances, the court must consider whether the witness who heard the statement is a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness). Other courts prohibit such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). Some courts look to whether extrinsic evidence supports or contradicts the declarant's statement. See, e.g., *United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because extrinsic evidence contradicts the declarant's account). Other courts hold that extrinsic evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The sentence added to the Rule sets forth factors that are always pertinent to the reliability of a declaration against penal interest. *See United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (setting forth these factors). Other factors may be pertinent under the

circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider. To do so would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

Reporter's Note:

The Committee rejected this proposal because it was thought that including corroborating circumstances factors in the text of the Rule might do more harm than good. There is a risk that by including some mandatory factors in the text, other factors might be left out.

Alternative 4: Across-the-Board Corroboration Requirement With the Corroboration Requirement Reduced:

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances ~~clearly~~ indicate the trustworthiness of the statement.

Committee Note for This Proposal:

The second sentence of the Rule is amended in two respects. The Rule now makes clear that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694 (5thCir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). A unitary approach to

declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The amendment also reduces the standard that the proponent must meet to satisfy the corroborating circumstances requirement. See Fla.Stat.Ann. § 90.902. A number of cases have appeared to set the corroborating circumstances so high as to render the exception of little utility. *See, e.g., United States v. Amerson,* 185 F.3d 676 (7th Cir. 1999); *United States v. McDonald,* 688 F.2d 224 (4th Cir. 1982). By requiring that corroborating circumstances "indicate" rather than "clearly indicate" the trustworthiness of the statement, the amendment provides a reasonable measure of protection against the admission of unreliable hearsay statements without being unduly exclusive.

Reporter's Note:

The Committee rejected this proposal because of the extensive pre-existing case law construing the requirement that corroborating circumstances "clearly" indicate the trustworthiness of the statement against penal interest. The Committee was concerned that deletion of the word "clearly" might send out the wrong signal and would be disruptive to the courts. Deletion of "clearly" might also lead to unreliable hearsay being admitted.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: October 15, 2007

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases considering whether certain hearsay is "testimonial" are grouped by subject matter.

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Hearsay Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

Hearsay Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation.

7. Warrants of deportation.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes.

10. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

11. Accusatory statements in a private diary.

12. Odometer statements prepared before any crime of odometer-tampering occurred.

13. A present sense impression describing an event that took place months before a crime occurred.

14. Business records — including medical records prepared with a view to litigation, and certificates of authenticity prepared for trial.

15. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

16. Judicial findings and orders in one case offered in a different case.

Conclusion as to Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Davis* (discussed below) has been applied by the circuit courts to narrow the definition of "testimonial" and thus to resolve some of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether the *Crawford* test is intended to apply to ministerial law enforcement activities such as a search for public records or certifications of records; whether and when statements made to law enforcement officials responding to an emergency become testimonial; and whether testimonial statements violate the Confrontation Clause when they are offered only as part of the basis of an expert opinion.

There is now no question, however, about the viability of *Roberts*. It is dead. The Court unanimously held in *Bockting, infra,* that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting*, because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the previously proposed amendment to Rule 804(b)(3) might be thought to have renewed relevance after *Bockting*. That amendment would have required that before a declaration against penal interest could be admitted against the accused, the government would have to prove corroborating circumstances clearly indicating the trustworthiness of the statement. (Currently, the corroborating circumstances requirement applies only to statements offered by the accused, not against the accused.) The Department of Justice objected to the amendment on the ground that the government already had the obligation, under the *Roberts* test, to prove that the declaration against penal interest was reliable under the circumstances, so the corroborating

circumstances requirement would impose either a redundant or, worse, a slightly different obligation on the government. But that argument no longer holds water after *Bockting* – the government does not have an obligation under the Confrontation Clause to prove that a declaration against penal interest is reliable. So the Committee may wish to reconsider the proposed amendment to Rule 804(b)(3) — and similar proposals directed toward assuring that hearsay offered against an accused is reliable under the circumstances. Of course, any amendment to the hearsay exceptions would have to be drafted in a way that would distinguish testimonial from non-testimonial hearsay, at least where it is offered against an accused.

The Committee has in the past proposed amendments when an Evidence Rule is subject to an application that would violate the Constitution. But there does not appear to be much risk of unconstitutional application of the hearsay exceptions given the case law after *Davis*. For example, the cases have essentially held that if a statement fits the excited utterance exception, it is for that reason non-testimonial after *Davis* — as it is in response to an emergency as opposed to an attempt to generate evidence for a criminal trial. Courts have reached similar conclusions with respect to business records, public records, co-conspirator statements, and declarations against interest: the factors that make hearsay statements admissible under these exceptions by definition mean that the statements cannot be testimonial.

Finally, the Committee may wish to consider at some point whether a problem exists if the standard for forfeiture under Rule 804(b)(6) is different from the standard for forfeiture under the Confrontation Clause. Rule 804(b)(6) conditions forfeiture on a finding that the wrongdoing was directed toward keeping a witness from testifying. Some courts have held that the constitutional standard requires no such finding, i.e., that it is sufficient that the defendant's wrongdoing caused the witness to be unavailable, without regard to whether the defendant caused the unavailability for the purpose of preventing testimony. Other courts have held that the constitutional standard for forfeiture does indeed require an intent to prevent testimony. The Committee might wish to consider 1) whether the constitutional standard of forfeiture is in fact different from that of Rule 804(b)(6) and if so, 2) whether it makes sense to amend Rule 804(b)(6) to accord with the constitutional test for forfeiture. Note that there is no question of Rule 804(b)(6) being unconstitutional. To the contrary, the question is whether the requirements of Rule 804(b)(6) should be reduced to the constitutional minimum.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

Admissions

Defendant's own hearsay statement was not testimonial: ***United States v. Lopez,*** 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself.* If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: ***United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.").

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford.* Such statements were not within the examples of statements found testimonial by the Court in

Crawford—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators. **Accord *United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as co-conspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. **Accord *United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005).

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); *United States v. Stover,* 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis,* "co-conspirators' statements made in pendency and furtherance of a conspiracy [are] not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)).

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004), and in ***United States v. Singh,*** 494 F.3d 653 (8th cir. 2007).

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: ***United States v. Townley,*** 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Underwood,*** 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court explained as follows:

> In this case, the challenged evidence consisted of recorded conversations between the confidential informant and Darryl in which arrangements were made for the confidential informant to purchase cocaine. This evidence is neither testimony at a preliminary hearing, nor testimony before a grand jury, nor testimony at a former trial, nor a statement made during a police interrogation. Moreover, the challenged evidence does not fall within any of the formulations which *Crawford* suggested as potential candidates for "testimonial" status. Darryl, the declarant in the challenged evidence, made statements to Hopps in furtherance of the criminal conspiracy. His statements clearly were not made under circumstances which would have led him reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.
>
> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest
(Including Accomplice Statements to Law Enforcement)

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States,* statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved statements made by accomplices to police

officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Accomplice confession to law enforcement is testimonial, even if it implicates the accused only indirectly: *United States v. Rashid,* 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made a number of statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 126 S.Ct. 2266 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford.* In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon.* The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington*. The court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

> **Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon,* the result appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls. When the statement is in response to an emergency, it is not testimonial.**

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is "fixing to shoot me." The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said "a black handgun." At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated "that's the guy that pulled the gun on me." A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was properly concerned about

her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of "testimonial" as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation. The court also made the following points:

1. The fact that Tamica left the scene to make the 911 call was irrelevant. While in *Davis,* the Court mentioned the fact that the *defendant* had left the scene as indicating that the emergency had passed, that reasoning does not apply when the *victim* leaves the scene and has no idea whether or not the defendant is following her.

2. Asking the victim to describe the gun did not amount to interrogation sufficient to make Tamica's answer testimonial: "Asking the victim to describe the gun represented one way of exploring the authenticity of her claim, one way in other words of determining whether the emergency was real. And having learned who the suspect was and having learned that he was armed, [the officers] surely were permitted to determine what kind of weapon he was carrying and whether it was loaded -- information that has more to do with preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information -- either to measure the threat to the public or to measure the threat to themselves? And what officer under these circumstances would have yielded to the prosecutor's concern of building a case for trial rather than to law enforcement's first and most pressing impulse of protecting the individual from danger?"

3. Tamica's statements upon Arnold's return were clearly not testimonial because they were prompted by Arnold's reappearance and not by any questioning by police officers: "This was not a statement prepared for court."

4. Because the statements were not testimonial, the Confrontation Clause had no applicability. This is because after *Davis*, the Confrontation Clause is solely concerned with testimonial hearsay, "meaning that the only admissibility question in this setting is whether the statement satisfies the Federal (or State) Rules of Evidence."

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found

statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.

Excited utterance not testimonial under the circumstances, even though made to law enforcement: ***Leavitt v. Arave,*** 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were geared more toward dealing with an emergency than toward investigating or prosecuting a crime.

Expert Witnesses

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury: ***United States v. Lombardozzi,*** 491 F.3d 61 (2d Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert to the structure of La Cosa Nostra and to the defendant's affiliation with organized crime. The expert

based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. The court observed that *Crawford* is inapplicable if testimonial statements are not used for their truth, and noted the circuit's previous determination "that it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless.

Forfeiture

Murder of witness by co-conspirators as a sanction to protect the privacy of the conspiracy constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant's drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant's conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding, rejecting the defendant's argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway due to his role in the loss of a drug shipment. The court stated that it is "surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." It concluded that the defendant's argument would have the "perverse consequence" of allowing criminals to avoid forfeiture if they could articulate a retaliatory intent. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* "foreclose" the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Constitutional standard for forfeiture does not require an intent to prevent the declarant from testifying: *United States v. Garcia-Meza,* 403 F.3d 364 (6th Cir. 2005): The defendant was charged with first-degree murder of his wife, who made statements to police officers implicating him. The defendant argued that his confrontation rights were violated by admitting the wife's statements, but the court found that the defendant forfeited his confrontation rights by murdering his wife. The defendant argued that forfeiture could not be found because he had not murdered his wife with the intent to prevent her from testifying. But the court stated that "there is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. The court elaborated as follows:

Though the Federal Rules of Evidence may contain such a requirement, see Fed. R. Evid. 804(b)(6), the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." *Crawford*, 124 S. Ct. at 1370. The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

Rule 804(b)(6) standard for forfeiture may be more stringent than that required by the Constitution: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): Hearsay statements were admitted against the defendant on the ground that he had forfeited both his hearsay and confrontation objections by aiding and abetting in the murder of the declarants. The court observed that "the scope of the forfeiture by wrongdoing doctrine under common law may differ from the version of the doctrine established by Rule 804(b)(6)" and that "although Rule 804(b)(6), may require that the defendant intend to procure a witness's unavailability to testify, under the common law forfeiture doctrine a defendant's confrontation rights may be extinguished even if her misconduct was not specifically directed toward rendering the witness unavailable." The court found it unnecessary to decide whether the standard for forfeiture was more permissive under the Constitution, however, because "the statements at issue here must, in any case, be admissible under the Federal Rules of Evidence (any forfeiture of Johnson's confrontation rights notwithstanding)." So it made no practical sense to find that the constitutional standard was more permissive.

On the question of forfeiture under the evidentiary standard, the court found that 1) aiding and abetting a murder was sufficient to establish forfeiture, and 2) it did not matter that the defendant's intent to render one witness unavailable was directed toward the trial of her accomplice and not herself: "it would make little sense in a case such as this to parse the forfeiture doctrine as finely as Johnson proposes."

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006)

(redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Grand jury testimony is testimonial: ***United States v. Wilmore,*** 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Informal Circumstances, Private Statements, etc.

Informal letter found reliable under the residual exception is not testimonial: ***United States v. Morgan,*** 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels***, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive (a proposition later rejected by the Supreme Court), it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: ***United States v. Brown,*** 441 F.3d 1330 (11th Cir. 2006): The defendant was convicted of murder of a federal employee. At trial, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked whether the defendant had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford*. The court reasoned as follows:

We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford.* (Citations omitted).

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004). . . We think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating or prosecuting the offense.

Reporter's Note: In *Cromer,* discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the reasonable anticipation that it would be used against the defendant.

Accomplice statement to law enforcement is testimonial: ***United States v. Nielsen,*** 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: ***United States v. Summers,*** 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: ***United States v. Arbolaez,*** 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: ***United States v. Sine;*** 493 F.3d 1021 (9th Cir. 2007): The court held that the introduction of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: ***United States v. Taylor,*** 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution..

Statements made by a child-victim to a forensic investigator are testimonial: ***United States v. Bordeaux,*** 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis*. There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.

Compare United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Statements made by a child-victim to a detective are testimonial: ***Bockting v. Bayer,*** 399 F.3d 1010 (9th Cir. 2005), *rev'd on other grounds,* , 127 S.Ct. 1173 (2007): The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford*. The court also held that *Crawford* was retroactive to cases on habeas review — that ruling that was reversed by the Supreme Court, see *infra*.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Private conversations and casual remarks are not testimonial: ***United States v. Malpica-Garcia,*** 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of some of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people "in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial." There was no indication that the statements were made "to police, in an investigative context, or in a courtroom setting."

Statement of an accomplice made to his attorney is not testimonial: ***Jensen v. Pliler,*** 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of "testimonial", Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Statement admitted against co-defendant only does not implicate ***Crawford: Mason v. Yarborough,*** 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Not Offered for Truth

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by ***Crawford,*** **as they were admitted to provide context for the defendant's own statements:** ***United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admitted not for its truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was

charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the Constitution was not violated because the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan,* 419 F.3d 172 (2d Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not

bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford.* The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford.* But in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection. This again shows the need to provide congruence between the hearsay rule and the Confrontation Clause. Otherwise there is a trap for the unwary, possibly resulting in an inadvertent waiver of the protections of the Confrontation Clause.

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford,* as they were admitted to provide context: *United States v. Paulino,* 445 F.3d 211 (2d Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true,

and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted for its truth: ***United States v. Trala,*** 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: ***United States v. Holmes,*** 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford.* The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford.* It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner

in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford*. ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice's statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Admission of the defendant's conversation with an undercover informant does not violate the Confrontation Clause, where undercover informant's part of the conversation is offered only for "context": ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant's part of the conversation was not barred by the Confrontation Clause, and the informant's part of the conversation was admitted only to place the defendant's part in "context." Because the informant's statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the "context" doctrine: "We note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "put words in Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit."

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: ***United States v. Price,*** 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the

use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.").

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: *United States v. Faulkner,* 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement."

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Records, Certificates, Etc.

Warrant of deportation is not testimonial: *United States v. Garcia,* 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford.* The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter." The court found no reason to disagree with the other circuits.

Proof of absence of business records is not testimonial: ***United States v. Munoz-Franco,*** 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

> Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Autopsy reports are not testimonial: ***United States v. Feliz,*** 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford.* Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis.* The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Certificate prepared by government officials for purposes of litigation is NOT testimonial: ***United States v. Rueda-Rivera,*** 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Warrant of deportation not testimonial: ***United States v. Valdez-Matos***, 443 F.3d 910 (5th Cir. 2006): In an illegal reentry case, the court found that a warrant of deportation was not testimonial. The court relied on *Rueda-Rivera*, supra, and stated that "generally documents in a defendant's immigration file are analogous to non-testimonial business records." The court concluded that a warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter."

Business records are not testimonial: ***United States v. Jamieson,*** 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: ***United States v. Ellis,*** 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

> Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, Ellis may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against Ellis in some kind of trial. . . .
>
> Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in Ellis's medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. *See, e.g., United States v. Cervantes-Flores,* 421 F.3d 825, 833 (9th Cir. 2005); *United States v. Rueda-Rivera,* 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford.*

The *Ellis* court found that the Supreme Court's analysis in *Davis* supported its view that a statement is not testimonial simply because it is prepared with the knowledge that it is likely to be used in a prosecution:

> In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. The Court considered the 911 operator's questioning of the woman to be an interrogation, and the operators themselves to be at least "agents of law enforcement." In the face of Davis's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. We believe this holding necessarily implies that consciousness on the part of the person reporting an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in Davis was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. . . . So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that they were not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
>
> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements

violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Certificate of nonexistence of an immigration record is not testimonial: ***United States v. Urqhart,*** 469 F.3d 745 (8th Cir. 2006): The defendant was convicted of illegal reentry into the United States after deportation. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It stated that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford.*"

Warrant of deportation is not testimonial: ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007): In an illegal reentry prosecution, the government used signed warrants of deportation to prove that the defendant had been deported from the country on two occasions. [The court described a warrant of deportation at "a document that commands an immigration official to take custody of the deportee and remove him from the United States. A signed warrant indicates that the attesting witness observed the deportee leaving the country."] The defendant argued that admitting the signed warrants violated *Crawford*, but the court disagreed. The court relied on *Davis's* "primary purpose" test and declared that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions." The court also noted that as to one of the warrants, there was no possible confrontation claim even if it was testimonial; this was because the official who signed the warrant testified at trial. The fact that he could not remember seeing the defendant leave the country was irrelevant, because he was still subject to cross-examination within the meaning of the Confrontation Clause.

Certificate prepared by government officials is NOT testimonial: ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005): The defendant was convicted of being found in the United States after deportation, without permission to re-enter. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It explained that while the *certificate* was prepared for litigation, the underlying records were not. (Though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence could still be so because the certificate is prepared for purposes of litigation). The court concluded as follows:

> Finally, we note the obvious—that the CNR does not resemble the examples of testimonial evidence given by the Court [in *Crawford*]. "Police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" all involve live out-of-court statements against a defendant elicited by a government officer with a clear eye to prosecution. Ruth Jones' certification that a particular record does not exist in the INS's files bears no resemblance to these types of evidence.

See also United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation was non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Weiland,*** 420 F.3d 1062 (9th Cir. 2006) (certification of a record of conviction by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.") (quoting *Bahena-Cardenas*).

> **Note: The result and rationale of *Cervantes-Flores* (and similar results in other circuits) indicate that hearsay statements offered under Rule 803(10), as well as affidavits authenticating business records under Rules 902(11) and (12), will be considered non-testimonial and therefore admissible even after *Crawford.***

Foreign business records are not testimonial: ***United States v. Hagege,*** 437 F.3d 943 (9th Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford.* The court rejected this argument and affirmed the convictions. It relied on the statement in *Crawford* that business records are an example of the kind of statements "which by their nature

are not testimonial." The court noted that "[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford.*"

Warrant of deportation prepared by government officials is NOT testimonial: *United States v. Cantellano,* 430 F.3d 1142 (11th Cir. 2005): In an illegal reentry case, the defendant argued that the warrant of deportation was testimonial under *Crawford* and therefore his right to confrontation was violated by its admission. The warrant was offered to prove that the defendant left the country. The Court held that the warrant was not testimonial. It reasoned as follows:

> Although the Court in *Crawford* declined to give a comprehensive definition of "testimonial" evidence, non-testimonial evidence fails to raise the same concerns as testimonial evidence. Because non-testimonial evidence is not prepared in the shadow of criminal proceedings, it lacks the accusatory character of testimony. Non-testimonial evidence is not inherently adversarial. We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.

The court also relied on the fact that the Fifth and the Ninth Circuits have held that certificates of no grant of entry (CNR's) are non-testimonial.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford.* The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: ***United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford **inapplicable where hearsay statements are made by a declarant who testifies at trial:** ***United States v. Kappell,*** 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Supreme Court

Strong indication (albeit dicta) that the *Roberts* test no longer governs non-testimonial hearsay: *Davis v. Washington and Hammon v. Indiana,* 126 S.Ct. 2266 (2006). In *Davis/Hammon*, the Court considered, in passing, "whether the Confrontation Clause applies only to testimonial hearsay." The Court stated that the answer to this question "was suggested in *Crawford,* even if not explicitly held." The Court then quoted a passage from *Crawford* indicating that the use of the term "witness" in the Sixth Amendment was intended to refer only to those who give "testimony" The Court then concluded that a "limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its core, but its perimeter." Thus, the strong implication from *Davis/Hammon* is that if hearsay is not testimonial, then the Confrontation Clause provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions — and perhaps by the Due Process Clause — but not by the Confrontation Clause.

But the language in *Davis/Hammon* does not rise to a holding, because there was no question in the case about application of the Confrontation Clause to any non-testimonial hearsay.

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 127 S.Ct. 1173 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases.

> Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). **But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.**

Unlike the same type of statement in *Davis,* which was dicta, it appears that this analysis constitutes part of the holding of the case. One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.*

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Pending legislation that could affect Evidence Rule 404.
Date: October 15, 2007

Hate crimes legislation is pending in the House and Senate that would appear to have an affect on the application of Rule 404 in hate crime prosecutions. John Rabiej reports that the legislation has a reasonable chance of enactment. This short memorandum describes the pertinent part of the legislation and the Rule 404-related issues it raises. The Committee may wish to consider whether the issues presented are important enough that the Committee should send a letter to Congress that would comment on the proposal.

The hate crimes legislation in the House is H.R. 1592: The Local Law Enforcement Hate Crimes Prevention Act of 2007. It has already been passed by the House. A similar bill has been introduced in the Senate, with 40 sponsors. The Senate bill is S.1105, and is known as the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007.

The section dealing with Rule 404 is identical in both bills, and provides as follows:

> (6)(d) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

One good thing is that the statute does not amend the text of the Evidence Rules. So it does not present all of the problems raised by the legislation that resulted in Rules 413-15.

But the legislation will probably alter the application of Rule 404 in hate crime prosecutions. Here are some possible concerns about the statutory language:

1. Assume an association or expression could be admitted for a non-character purpose under Rule 404(b) — for example, that a gang relationship could be offered not to prove character but

because it is probative of a motive to commit a certain hate crime. The bill appears to provide that even if that evidence were admissible under Rule 404(b), it would not be admissible in the covered prosecution because it would be offered as "substantive evidence." The policy reason for altering Rule 404(b) in this context is muddled, because the evidence *would* be admissible to impeach the defendant if he takes the stand. Why would the supposedly objectionable evidence be inadmissible when offered to prove motive, but admissible when offered to prove bias once the defendant testifies?

2. An exception is created if the evidence "specifically relates" to that offense. What does that mean? For example, does evidence of motive "specifically relate" to the offense? If not, why not? The drafters may be trying to approximate the line of cases holding that bad acts that are "inextricably intertwined" with the charged crime are not covered by Rule 404(b) because they are not "other acts." If that is the intent, then the statute should try to track the "inextricably intertwined" language used in the case law on Rule 404(b) — otherwise litigants are bound to be confused about the statutory intent.

It's notable that the circuits have different definitions of just what is inextricably intertwined. *See, e.g., United States v. Griffin,* 493 F.3d 856 (7th Cir. 2007), where the court held that evidence is inextricably intertwined with the crime charged "if it helps complete the story of the crime on trial, if its absence would create a conceptual or chronological void in the story of the crime on trial, or if it is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove an element of the charged crime." That definition is so broad as to cover almost any bad act, including an act offered to prove motive, as motive "tends to prove an element of the crime." Compare the narrower definition in *United States v. Sumlin,* 489 F.3d 683 (5th Cir. 2007), stating that a bad act is inextricably intertwined when "both acts are part of a single criminal episode, or it was a necessary preliminary to the crime charged." Using a different standard such as "specifically related" can only create more confusion.

3. The bill distinguishes between "substantive evidence" and evidence offered for "impeachment." The term "substantive" is not used in the Evidence Rules. While most lawyers know what is meant by the term "substantive" in this context, it is possible that the term can create confusion as it is essentially a conclusory term.

Professor George Fisher of Stanford Law School concludes that as a drafting matter, the legislation is "singularly difficult to translate into anything comprehensible without risking mistranslation." It seems hard to disagree with this assessment. It's not surprising though, because any attempt to work around Rule 404(b) raises a daunting issue of drafting.

One question for the Committee is whether the issues raised by the legislation are troubling enough to justify a letter to Congress. It could be argued that the issues raised are minor, because the legislation 1) does not directly amend an Evidence Rule; 2) applies only to hate crime prosecutions; and 3) might be thought of as a valiant attempt to limit some of the excesses that have occurred under Rule 404(b) and as such should not be discouraged.

It is of course for the Committee to determine whether the problems and ambiguities raised by the hate crimes legislation are serious enough to warrant comment. If the Committee does decide to weigh in, the next question is what the Committee should recommend as an alternative. It would seem that the only viable alternative is to delete the provision entirely and revert to Rule 404(b). The legitimate First Amendment concerns about admitting evidence of expressions and associations can perhaps be handled by a judicious use of the existing Rule. Under Rule 404(b) the court can require assurance that the evidence is offered for a viable non-character purpose; and under Rule 403 the court can exclude the evidence in any case if it raises a risk of undue prejudice.

VI.

Calendar for March 2008 - May 2008 (United States)

March 2008

Su	Mo	Tu	We	Th	Fr	Sa
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May 2008

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Holidays and Observances:

Mar 20 Vernal equinox | Mar 23 Easter Sunday | May 11 Mother's Day | May 26 Memorial Day

Calendar generated on www.timeanddate.com/calendar